

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL with Affid. of Service
75-7175

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7175

ERNEST KLEIN,

Plaintiff-Appellant,

-against-

SPEAR, LEEDS & KELLOGG, JAMES CRANE KELLOGG III,
and RAYMOND E. GRABOWSKI,

Defendants-Appellees.

APPENDIX TO PLAINTIFF-APPELLANT'S BRIEF



KLEIN & ROSENZWEIG,
Attorneys for Plaintiff-Appellant,
Office & P. O. Address
26 Court Street
Brooklyn, N.Y. 11242
Tel. UL.2-5266

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ERNEST KLEIN,

Plaintiff,

-against-

NOTICE OF APPEAL

DOCKET NO.
68 CIV. 5148 (HFW)

SPEAR, LEEDS & KELLOGG, JAMES
CRANE KELLOGG III, RAYMOND E.
GRABOWSKI, MARON, NUGENT & CO.,
WEINGARTEN & CO., HERMAN LASS,
LEW SONN, SIDNEY S. BOBBE,
VANDEN, BROECK LIEBER & CO.,
THOMSON & MCKINNON, REYNOLDS
& CO. and HERMAN FINS,

Defendants.

- - - - - x

NOTICE OF APPEAL TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Notice is hereby given that ERNEST KLEIN, plaintiff
above named, hereby appeals to the United States Court of Appeals
for the Second Circuit from the Order of Hon. Henry F. Werker,
Judge of the United States District Court for the Southern
District of New York, dated December 3, 1974, granting the motion
of the defendants Spear, Leeds & Kellogg, James Crane Kellogg III
and Raymond E. Grabowski^{for} summary judgment pursuant to Rule 56 of
the Federal Rules of Civil Procedure dismissing the First Cause

of Action set forth in the Amended Complaint and further dismissing the Second Cause of Action pleaded in the Amended Complaint pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Dated: New York, N. Y.

January 2, 1975

GAINSBURG, GOTTLIEB, LEVITAN & COLE

By *Michael M. Gainsburg & Robert A. Gottlieb*
Attorneys for Plaintiff

Office & P.O. Address
122 East 42nd Street
New York, N. Y. 10017

TO:

REAVIS & McGRATH
Attorneys for the Moving Defendants
Spear, Leeds & Kellogg, James J. Kellogg III
and Raymond E. Grabowski
1 Chase Manhattan Plaza
New York, N. Y. 10005

MEMORANDUM DECISION AND ORDER
FILED DECEMBER 3, 1974, APPEALED FROM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



ERNEST KLEIN,

Plaintiff,

- against -

SPEAR, LEEDS & KELLOGG, JAMES
CRANE KELLOGG III, RAYMOND E.
GRABOWSKI, MABON, NUGENT & CO.,
WEINGARTEN & CO., HERMAN LASS,
LEW SONN, SIDNEY S. BOBBE,
VANDEN, BROECK LIEBER & CO.,
THOMSON & MCKINNON, REYNOLDS
& CO., and HERMAN FINS,

Defendants.

MEMORANDUM DECISION
AND ORDER

68 Civ. 5148 (HFW)

#41509

HENRY F. WERKER, D. J.

Defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski, have moved for summary judgment with respect to the First Cause of Action in the amended complaint under Rule 56, Federal Rules of Civil Procedure upon the ground that no triable issue of fact remains to be tried.

They also move for an order dismissing the Second Cause of Action in the amended complaint upon the grounds: (1) that plaintiff has commenced a later action in this court entitled Klein v. Bache & Co., et al., 71 Civ. 20, in which exactly the same claims alleged against the moving parties as are alleged against them in the Second Cause of Action in the amended complaint here; and (2) and that

plaintiff has been guilty of gross and unexcusable neglect in proceeding with the prosecution of the Second Cause of Action since the commencement of this action on December 27, 1968.

With respect to the motion for Summary Judgment the defendants rely in large part upon the decision of Judge Motley in this action dated August 22, 1972, the order entered on that decision and the affirmance of that decision on April 25, 1973, by the Court of Appeals, and upon in an identically entitled counterpart action commenced by the plaintiff herein in the New York Supreme Court, Kings County, Index No. 3283/69.

The claim against these defendants like the claim against Weingarten against whom the First Cause of Action was also brought and has now been dismissed by Judge Motley, arises out of the purchase of securities by Weingarten for plaintiff in November 1962. Klein opened an account with Weingarten and deposited \$1000. The broker at Klein's direction purchased through Mabon, Nugent & Co., 20 shares of Superior Oil Co. stock for his account at \$1140.00 per share. Ten of the shares were acquired from Spear, Leads & Kellogg, the specialist in the stock, out of its own inventory, and the other shares were purchased from Vanden, Broeck, Lieber & Co. Klein was notified of the purchase and requested to pay the balance of the purchase price. When he failed to do so the stock was sold for his account

which sale resulted in a net loss of \$151.97. The broker returned the balance of his \$1000 to Klein after deducting the amount of the loss.

Klein claims that the broker as well as the moving parties here manipulated the price so that the purchase was at a higher price than the prevailing market price was at the time for Superior Stock. It is also alleged that the execution of the order was manipulated so that in some strange way 10 shares became a "round lot" -- not an "odd lot." Superior Oil Co. is sold on the New York Stock Exchange. The definition of round lot and odd lot contained in Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 559 (1968 2 CA) is that a round lot is a transaction involving 100 shares and an odd lot is a transaction involving less than 100 shares. See, also, New York Stock Exchange, Constitution, Art. XV, § 2(d). The cost of the shares affects only the odd lot differential which is paid to the odd lot dealer. The higher the cost the higher¹ the percentage of the differential.

I have gone into this simply to point out the diversionary tactics here employed by plaintiff in his affidavit in opposition where he asserts, "It should be noted that in this stock alone, 10 shares, because of the price of the security were deemed a 'round lot.'"

The alleged conspiracy between these defendants and Vanden Broeck Lieber & Co. to sell Mabon the other 10 shares from its own account in two "odd" lots of five shares

each is the balance of the claim of manipulation of the order. Since the price differential in odd lots was fixed whether the shares were obtained from two or ten sources it would have made no difference and could have no other effect upon the price differential.

The gravamen of the complaint however is the manipulation of price. If there was no manipulation of price the plaintiff would have no complaint for no loss on the purchase could be claimed by him. As Judge Motley observed: "The lowest price for the Superior stock on November 30, 1962 was \$1130 per share and the highest was \$1140. The maximum possible damage Klein would therefore have suffered if defendants purchased the shares above the prevailing market rate was \$10 per share or \$200."

Judge Motley also stated:

" Defendants contend that there was no manipulation of the purchase price. Klein's answers to defendants' interrogatories demonstrate that he has absolutely no personal knowledge that the purchase price was anything other than the prevailing one. He cannot set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed. R. Civ. P."

" It is impossible to avoid the conclusion that Klein did not have any basis in fact to believe there was a manipulation of the price of the Superior stock. He has had over three years since the filing of his original complaint and over 2 1/2 years since the filing of his amended complaint to give life to his phantasmagoric allegations; that is long enough.

Since we find no issue of fact remaining on the first cause of action, defendants are entitled to judgment dismissing the first cause of action."

This court fails to perceive any substantial difference between the position of Weingarten and the odd lot brokers. If plaintiff cannot produce evidence to show manipulation of the price against one he must fail against both.

The decision by Judge Motley in this case with respect to Weingarten as affirmed by the Court of Appeals is controlling here.

Since those decisions plaintiff has had more than a year to buttress his claim of manipulation of price. He has failed to do so. His affidavit in opposition to this motion does not in anyway create an issue in this regard and this is the heart of his claim.

Furthermore, in the action commenced by plaintiff against these defendants in the New York Supreme Court, Kings County which was dismissed on January 2, 1972 the court stated in its unreported decision:

" In this action both requirements are present. Clearly the Kellogg defendants' posture is identical to that of Weingarten & Co., etc. It already having been determined that there is no basis for any claim against Weingarten, it follows that the action against movants, the Kellogg defendants must also fail. On the basis of the determination already made, it is clear that the doctrines of res adjudicata and collateral estoppel bars plaintiff from prosecuting the first cause of action

against movants." (See NYLJ dated January 13, 1972, for decision of Liebowitz J at Special Term Part I, Kings County.)

" Where two actions are based upon and can be maintained by producing the same evidence res judicata has been held applicable (Perry v. Dickerson, 85 N.Y. 345 although in each case different remedies are sought (Lipkind v. Ward, 256 App. Div. 74, 78; Cariello v. City of New York, 15 Misc.2d 466; City of Yonkers v. Dyl & Dyl, 67 Misc.2d 704, 109.))" N.Y. Law Journal, January 13, 1972, Vol. 167, No. 9 at 19.

Judge Cooper, in a decision involving the first motion for summary judgment in this case reported at 306 F. Supp. (S.D.N.Y. 1969), held at p. 747 that a final state court decision dismissing a breach of contract action commenced against Weingarten by this plaintiff was final and conclusive and barred plaintiff from relitigating that action not only as to those defendants but also as to added defendants including the movants here.

The motion for summary judgment is consequently granted on both grounds.

With respect to defendants' motion to dismiss the Second Cause of Action under Rule 41, Federal Rules of Civil Procedure dismissal is within the discretion of the court. Link v. Wabash R. Co., 370 U.S. 626 (1962). Plaintiff has had this Second Cause of Action pending since he amended his complaint under date of August 21, 1969. It was stayed by this court on January 13, 1972 until disposition of the

counterpart action in the Kings County Supreme Court. That stay could have been removed at any time after June 1, 1973, the date when Judge Cone denied Plaintiff's Motion to Reargue. The motion to reargue was made after the time to appeal had expired and was based upon a modification by the Appellate Division Second Department of an order dismissing the cause of action to the extent that it permitted the plaintiffs to amend in a Klein v. Bache & Co. action commenced in New York Supreme Court Kings County, Index No. 20042/70. Although plaintiff filed a notice of appeal from the order denying the motion to reargue it appears clear that that appeal does not lie. ² Plaintiff has not moved to remove that stay nor has he made any efforts at discovery. He indicates now that no discovery is required. He also failed to appear for deposition on an earlier notice for which reason the movants did not submit to examination.

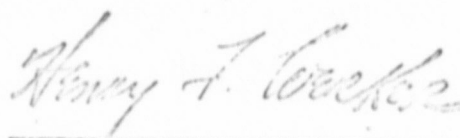
He admits that the Klein v. Bache & Co., 71 Civ. 20, action does involve the same basic facts as the Second Cause of Action here. He tries to ameliorate this by indicating that at the time he was appearing pro se. A reading of the prior decisions of the judges of this court indicate that the plaintiff here apparently had undisclosed legal assistance throughout. See, Klein v. H.N. Whitney, Goodby & Co., et al., 341 F. Supp. 699, 702 (1971); Klein v. Spear, Leeds & Kellogg, 306 F. Supp. 743, 746 (1969); Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342 (1970).

Under the circumstances existing this court is not inclined to consolidate this case with other so-called specialist cases. I find that the plaintiff has been grossly dilatory in prosecuting the Second Cause of Action within the meaning of Rule 41, Federal Rules of Civil Procedure. "The operative condition of the Rule is lack of due diligence on the part of the plaintiff -- not a showing by the defendant that it will be prejudiced by denial of its motion." Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956) (citation omitted).

The Second Cause of Action is dismissed with prejudice.

SO ORDERED.

Dated: New York, New York
December 2, 1974.



U. S. D. J.

NOTES

1. In Eisen, supra, it was found that during the years 1960-66 the differential was 1/8th of a point, 12-1/2 cents per share on stock selling below \$40 per share and 1/4th of a point, 25 cents per share on stock selling at \$40 or above per share.
2. An order denying reargument is not appealable. See, N.Y.C.P.L.R. § 2221 (McKinney 1974) and Practice Commentary 12221:7. Nor may such a motion be made after the period for appeal has expired. Liberty National Bank & Trust Co. v. Boro Const. Corp., 29 A.D.2d 627, 268 N.Y.S.2d 287, 78h Dept. (1967). "While this result might at times seem harsh, there must be an end to lawsuits and the time to take an appeal cannot forever be extended." (In re Rule, 20 N.Y.2d 568, 285 N.Y.S.2d 610, 232 N.E.2d 642 (1967).)

AMENDED COMPLAINT

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DATED AUGUST 21, 1969, FILED AUGUST 22, 1969.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ERNEST KLEIN,

Plaintiff,

-against-

SPEAR, LEEDS & KELLOGG, JAMES CRANE,
KELLOGG III, RAYMOND E. GRABOWSKI,
MABON, NUGENT & CO., WEINGARTEN & CO.,
VANDEN EROECK, LIEBER & CO., and
THOMSON & MCKINNON,

Defendants.
-----X

:
:
: JURY TRIAL REQUESTED

: CIVIL ACTION
: NO. 5148 CIVIL 1968

: AMENDED
: COMPLAINT

Plaintiff, pro se, as and for his Amended Complaint,
respectfully alleges on information and belief:

1. This is an action for damages resulting from violations of the provisions of the Securities Act of 1933 (hereinafter called the "1933 Act"), and of the Securities Exchange Act of 1934 (hereinafter called the "1934" Act"), and under Regulation T issued by the Board of Governors of the Federal Reserve System pursuant to the "1934 Act" (Section 17(a) of the "1933 Act," 15 U.S.C. Section 77q(a); 48 Stat. 886, 49 Stat. 704 15 USCA 78g; 48 Stat. 891, 15 USCA 78j; 48 Stat. 903, 15 USCA 78bb; 52 Stat. 1076, 15 USCA 78cc), as hereinafter more fully appears.

2. Exclusive jurisdiction of this action is conferred on this Court under the "1934 Act" (15 USCA Section 78aa).

3. Venue is properly laid in the Southern District of New York, because all defendants reside or maintain offices for the regular transaction of business, and transact and do business in this District.

Amended Complaint

4. The plaintiff's claim and the matter in controversy herein, exceeds exclusive of interests and costs the sum of TEN THOUSAND DOLLARS (\$10,000.00).

5. Plaintiff, ERNEST KLEIN, at all times relevant hereto has been a resident of the City and State of New York.

6. The defendant, SPEAR, LEEDS & KELLOGG (hereinafter called "SPEAR"), at all times relevant hereto was a partnership engaged in the business as brokers and dealers in securities registered with the Securities and Exchange Commission (hereinafter called "SEC"), under Section 15(b) of the "1934 Act," 15 USC Section 77, and "SPEAR" maintains, and at all times relevant hereto maintained a principal office for the regular transaction of business at 111 Broadway, in the City and State of New York.

7. That "SPEAR," at all times relevant hereto, was a member organization of the New York Stock Exchange, a national securities exchange, and of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to Section 15 of the "1934 Act" as amended.

8. The defendant JAMES CRANE KELLOGG, III (hereinafter called "MR. KELLOGG"), at all times relevant hereto, was a member of the New York Stock Exchange, and was a partner of "SPEAR", and was one of the specialists handling the stock of Superior

Amended Complaint

Oil of California (hereinafter called "SUPERIOR"), on the New York Stock Exchange; and "MR. KELLOGG" maintains, and at all times relevant hereto, maintained a principal office for the regular transaction of business in the City and State of New York.

9. The defendant, RAYMOND E. GRABOWSKI (hereinafter called "GRABOWSKI"), at all times relevant hereto, was a partner and a member of "SPEAR," and one of the specialists handling the stock of "SUPERIOR" on the New York Stock Exchange, and maintained a principal office for the regular transaction of business, in the City of New York, State of New York.

10. That, "SPEAR," at all times relevant hereto, was the "specialist" on the New York Stock Exchange in the Stock of "SUPERIOR."

11. That defendant MABON, NUGENT & CO. (hereinafter called "NUGENT"), at all times relevant hereto, was a partnership engaged in the business as brokers and dealers in securities registered with the "SEC"; and was a member of the New York Stock Exchange, a National Securities Exchange, and of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to the "1934 Act"; and "NUGENT" maintains, and at all times relevant hereto, maintained a principal office of its business in the City and State of New York.

12. That MABON & CO. (hereinafter called "MABON,") at all times relevant hereto, was a partnership, engaged in the business as brokers and dealers in securities registered with the "SEC"; and was a member of the New York Stock Exchange, a National Securities Exchange, and of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to the "1934 Act"; and maintained a principal office of its business in the City and State of New York.

13. That "MABON" is the predecessor of "NUGENT."

14. That defendant "VANDEN BROECK, LIEBER & CO. (hereinafter called VANDEN"), at all times relevant hereto, was a partnership, engaged in the business as brokers and dealers in securities registered with the "SEC"; and was a member of the New York Stock Exchange, a National Securities Exchange, and was a member of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to the "1934 Act"; and "VANDEN" maintains, and at all times relevant hereto, maintained a principal office of its business in the City and State of New York.

15. That one, STEPHEN A. LIEBER, (hereinafter referred to as "MR. LIEBER"), at all times relevant hereto, was a partner of "VANDEN."

16. That defendant WEINGARTEN & CO. (hereinafter called "WEINGARTEN"), at all times relevant hereto, was a partnership engaged in the business as brokers and dealers in securities

Amended Complaint

registered with the "SEC"; and was a member of the New York Stock Exchange, a National Securities Exchange, and was a member of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to the "1934 Act"; and "WEINGARTEN" at all times relevant hereto, maintained a principal office of its business in the City and State of New York.

17. That one, HERMAN LASS (hereinafter called "LASS"), at all times relevant hereto, was a partner or an associate, or an employee of "WEINGARTEN," and maintained a principal office of business in the City and State of New York.

18. That one, LEW SONN (hereinafter called "SONN"), at all times relevant hereto, was a partner or an associate, or an employee, of "WEINGARTEN," and maintained a principal office of business in the City and State of New York.

19. That one, SIDNEY S. BOBBE (hereinafter called "BOBBE"), at all times relevant hereto, was an attorney of law, with his office located in the City and State of New York.

20. That "BOBBE" at all times relevant hereto was employed by "WEINGARTEN" as their attorney and lawyer in an action brought on by plaintiff in Supreme Court, Kings County, entitled: Ernest Klein, plaintiff. vs. Weingarten & Co., and Mabon, Nugent & Co., defendants.

Amended Complaint

21. That "BOBBE," at all times relevant hereto, was employed by "NUGENT" as their attorney and lawyer in an action brought on by plaintiff in Supreme Court, Kings County, entitled Ernest Klein, plaintiff, vs. Weingarten & Co. and Mabon, Nugent & Co., defendants.

* * *

AND FOR A FIRST CAUSE OF ACTION
AGAINST DEFENDANTS "SPEAR", "KELLOGG",
GRADOMSKI, "VANDER", "NUGENT", AND
"WEINGARTEN".

25. Plaintiff repeats, reiterates, and realleges each and every allegation set forth in paragraphs "1" through "24" as if fully set forth at length herein.

26. That, on the 30th day of November, 1962, plaintiff employed "WEINGARTEN," to act as plaintiff's stockbroker, agent and fiduciary and to open two (2) accounts for plaintiff, in plaintiff's name; namely, a cash account for the purchase of securities on the said day, November 30, 1962 in such cash account, and a margin account, for the eventual future purchases of securities in such margin account.

27. It was agreed between plaintiff and "WEINGARTEN" that full cash payment for the securities to be purchased in said cash account, is to be made against delivery of such securities, to plaintiff, or his designee.

28. Pursuant to the aforesaid employment, on the said day of November 30, 1962, plaintiff ordered 20 shares of

Amended Complaint

"SUPERIOR" and 100 shares of "POLAROID" to be purchased in said cash account, by "WEINGARTEN," on the New York Stock Exchange.

29. That, prior to the aforesaid employment "WEINGARTEN" represented to plaintiff that (a) all purchase orders that will be placed by plaintiff in said cash account, will be executed on the New York Stock Exchange, by "WEINGARTEN" (b) that "WEINGARTEN" will advance the sums of moneys needed for the consummation of such purchases, providing that plaintiff will make an initial deposit of \$1,000.00, on such purchases, and providing that plaintiff will reimburse "WEINGARTEN" for such advances and will pay the total amount due on such purchases, including commissions, upon delivery of the stock certificates to plaintiff or to his designee; (c) that for the consideration of receiving from plaintiff brokerage commissions and the \$1,000.00 initial deposit, as aforementioned "WEINGARTEN" will act as plaintiff's broker, agent and fiduciary and will open for plaintiff two accounts, one for transactions in a cash account and one for the eventual future transactions in a margin account, and will purchase for plaintiff in said cash account, on the same day, November 30, 1962, on the New York Stock Exchange, twenty (20) shares of "SUPERIOR" stock and one hundred (100) shares of POLAROID" stock.

30. That, thereafter, on said day of November 30, 1962, "WEINGARTEN" informed plaintiff that they had in fact executed

Amended Complaint

the aforesaid purchase orders, and had bought for plaintiff twenty (20) shares of "SUPERIOR" at \$1,140.00 per share and one hundred (100) shares of "POLAROID" at \$129.00 per share.

31. That, thereafter, on or about December 3, 1962, plaintiff received in the mail confirmation slips from "MABON," that "MABON" bought on behalf of plaintiff and "WEINGARTEN" the aforementioned securities, in a cash account.

32. That, on December 6, 1962, plaintiff instructed "MABON" to deliver the certificates of the aforesaid shares of "SUPERIOR" and "POLAROID" to plaintiff's designee, against payment of \$34,781.19, the full amount due thereon.

33. On December 6, 1962, plaintiff received a Western Union telegram from "MABON," dated December 5, 1962, which threatened to sell out the stocks bought for plaintiff, including the 20 shares of "SUPERIOR" stock.

34. On the same day of December 6, 1962, plaintiff protested by telephone to "MABON" and advised "MABON" that he made arrangements with O'DONNELL & CO., INC., a financier, to pay to "MABON" the \$34,781.19 due for all of plaintiff's stock, against delivery, and demanded such delivery against payment.

35. That, "MABON" failed to comply with plaintiff's instructions and did not deliver said securities.

36. That, thereafter, plaintiff discovered, that neither "MABON," nor "WEINGARTEN" had in their possession or

Amended Complaint

control the aforesaid stock certificates physically ready and available for delivery, on said date of December 6, 1962.

37. That prior to November 30, 1962, the defendant "VANDEN" maintained numerous accounts in the name of one, Mrs. Florence S. Lieber (hereinafter called "MRS. LIEBER"), and in the name of one, Mrs. Isabel Brach (hereinafter called "MRS. BRACH").

38. That the aforesaid accounts "MRS. LIEBER" and "MRS. BRACH" were maintained for the benefit and interest of "MR. LIEBER" and/or "VANDEN," and were not accounts belonging to disinterested customers of "VANDEN"; that the accounts designated "MRS. LIEBER" and "MRS. BRACH" were kept in the aforementioned two names "MRS. LIEBER" and "MRS. BRACH" in order to conceal the true identity of the actual owners thereof.

39. That "MR. LIEBER" was the beneficial owner of the said accounts under the name of "MRS. LIEBER".

40. That "MR. LIEBER" was the beneficial owner of the said accounts under the name "MRS. BRACH."

41. That "VANDEN" was the beneficial owner of the said accounts under the name "MRS. LIEBER."

42. That "VANDEN" was the beneficial owner of the said accounts under the name "MRS. BRACH."

43. That on November 30, 1962, at the time when plaintiff's order for the purchase of the 20 shares of "SUPERIOR" was

Amended Complaint

transmitted to the New York Stock Exchange, the then prevailing price for "SUPERIOR" was below \$1,140.00 per share.

44. That ten (10) shares of the aforesaid twenty (20) shares of "SUPERIOR" were sold by "SPEAR," as principal for its own account.

45. That ten (10) shares of the aforesaid twenty (20) shares of "SUPERIOR" were sold by "VANDEN," as principal for its own account or for one of its partners, "MR. LIEBER" as principal for his own account, for the account of "SPEAR" or "KELLOGG" or "GRABOWSKI" as principals.

46. Plaintiff discovered, that "MABON" and/or "WEINGARTEN" manipulated the execution of the order of said 20 shares of "SUPERIOR" by obtaining 10 shares of the said 20 shares from "SPEAR," or "KELLOGG", or "GRABOWSKI," the specialists in "SUPERIOR" stock, and 10 shares of the said 20 shares from two odd-lots of five (5) shares each "SUPERIOR", maintained and/or owned by "VANDEN" and/or owned by "VANDEN's" partner, "MR. LIEBER in the names of "MRS. LIEBER" and "MRS. BRACH", instead of obtaining them on the open market of the New York Stock Exchange; and also manipulated the price to be fixed at higher prices than the prevailing market price was at that time for "SUPERIOR" stock.

47. That on December 6, 1962, the settlement date for the aforesaid trade, neither "SPEAR," nor "VANDEN" did deliver to "MABON" the aforesaid 20 shares of "SUPERIOR".

48. That the execution of the order by "MABON" through "SPEAR" and "VANDEN," and the purchase price fixed for the said 20 shares of "SUPERIOR" at \$1,140.00 per share, constituted a manipulative and deceptive device, scheme or plan to defraud plaintiff, in violation of the "1933 Act," and of the "1934 Act," and constituted a violation of the Rules of Fair Practice of the National Association of Securities Dealers, Inc., and of the rules and regulations of the New York Stock Exchange, and constituted a violation of the present New York General Business Law, Sections 351, 351a, 351b, 351d, formerly known as the New York Penal Law.

49. That, "BOBEE," "LASS," "SOHN," "KELLOGG," "GRABOWSKI," "HUGENT," "WEINGARTEN," "SPEAR," "VANDEN," and "MABON" severally, and each of them, conspired with each other in circumventing the discovery of the aforementioned violations and fraudulent acts.

50. That "MABON" fraudulently and wrongfully treated and designated plaintiff's purchases of said securities, as if they were bought in a "margin account," when they were bought, in truth and in fact in a cash account, and such fact was known to "MABON".

51. That "WEINGARTEN", fraudulently and wrongfully treated and designated plaintiff's purchase of said securities, as if they were bought in a "margin account" when in truth and in fact they were bought in a cash account, and such fact was known to "WEINGARTEN".

Amended Complaint

52. That, the defendants named in the preceding paragraphs fraudulently and wrongfully treated plaintiff's purchase of said securities as if they were bought in a "general account", when in truth and in fact they were bought in a cash account, and such fact was known to said defendants.

53. That, "MABON," violated Regulation T issued by the Board of Governors of the Federal Reserve System under the "1934 Act," when it treated plaintiff's aforesaid purchases as transactions made in a "general account."

54. That, "MABON" violated Regulation T issued by the Board of Governors of the Federal Reserve System under the "1934 Act," when it treated plaintiff's aforesaid purchases as transactions made in a "margin account."

55. That, "WEINGARTEN" violated Regulation T issued by the Board of Governors of the Federal Reserve System under the "1934 Act," when it treated plaintiff's aforesaid purchases as transactions made in a "general account."

56. That, "WEINCARTEN" violated Regulation T issued by the Board of Governors of the Federal Reserve System under the "1934 Act", when it treated plaintiff's aforesaid purchases as transactions made in a "margin account."

57. That, on the 6th day of December, 1962, the settlement date of the aforesaid trade in "POLAROID," "MABON" had not received from the selling broker of the said "POLAROID" stock the 100 shares of "POLAROID," and did not possess any

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other certificates of 100 shares of "POLAROID" to deliver them to plaintiff or to his designee, on said date.

58. That, on the 7th day of December, 1962, "MABON" had not received from the selling broker of the said "POLAROID" stock the 100 shares of "POLAROID", and did not possess any other certificates of 100 shares of "POLAROID" stock to deliver them to plaintiff or to his designee, on said date.

59. That, on the 6th day of December, 1962, the settlement date of the aforesaid trade in "SUPERIOR," "MABON" had not received from the aforementioned purported sellers, "SPEAR" and, or "VANDEN" the 20 shares of "SUPERIOR"; and "MABON," did not possess on said date any other certificates of 20 shares of "SUPERIOR", to deliver them to plaintiff or to his designee.

60. That, on the 7th day of December, 1962, "MABON", had not received from the aforementioned purported sellers, "SPEAR," and/or "VANDEN," the 20 shares of "SUPERIOR"; and "MABON," did not possess any other certificates of 20 shares of "SUPERIOR" to deliver them to plaintiff or to his designee, on said date.

61. That, on the 6th day of December, 1962, "WEINGARTEN" had not received from the aforementioned purported sellers, "SPEAR" and/or "VANDEN", the 20 shares of "SUPERIOR"; and "WEINGARTEN" did not possess on said date any other certificates of 20 shares of "SUPERIOR" to deliver them to

Amended Complaint

plaintiff or to his designee.

62. That, on the 7th day of December, 1962, "WEINGARTEN" had not received from the aforementioned purported sellers, "SPEAR" and/or "VANDEN" the 20 shares of "SUPERIOR"; and "WEINGARTEN" did not possess on said date, any other certificates of 20 shares of "SUPERIOR" to deliver them to plaintiff or to his designee.

63. That, on the 6th day of December, 1962, the settlement date of the aforesaid trade in "POLAROID", "WEINGARTEN" had not received from the selling broker of the said "POLAROID" stock the 100 shares of "POLAROID", and did not possess any other certificates of 100 shares of "POLAROID" to deliver them to plaintiff or to his designee, on said date.

64. That, on the 7th day of December, 1962, "WEINGARTEN" had not received from the selling broker of the said "POLAROID" stock the 100 shares of "POLAROID," and did not possess any other certificates of 100 shares of "POLAROID" stock to deliver them to plaintiff or to his designee, on said date.

65. That, "MABON" and/or "WEINGARTEN" failed and refused to deliver to plaintiff or his designee the above named securities ordered by plaintiff, and wrongfully and fraudulently sold same, before paying for the same the alleged amounts due to said sellers, and before receiving possession of the certificates of the said securities, in violation of

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Regulation T, under the "1934 Act".

66. That "WEINGARTEN" did not in fact make any bona fide purchases of "SUPERIOR" from disinterested third parties whatever on plaintiff's behalf, but merely reported and represented to plaintiff that such purchases were made; that the reports and representations were untrue and false.

67. That "WEINGARTEN" did not in fact make any advances for plaintiff's account in connection with said purchases of (20) twenty shares "SUPERIOR" and did not become entitled to any commissions in connection therewith.

68. That "MABON" did not in fact make any bona fide purchases of "SUPERIOR" from disinterested third parties whatever on plaintiff's behalf, but merely reported and represented to plaintiff that such purchases were made; that the reports and representations were untrue and false.

69. That "MABON" did not in fact make any advances for plaintiff's account in connection with said purchases of (20) twenty shares "SUPERIOR," and did not become entitled to any commissions in connections therewith.

70. That, at all times relevant hereto, a "Round-lot" unit of trading in "SUPERIOR", on the New York Stock Exchange consisted of 10 shares "SUPERIOR."

71. That, at all times relevant hereto, any number of full shares "SUPERIOR", less than 10 shares, were considered as an "Odd-Lot."

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72. That the usual procedure for the execution of orders to buy or to sell "Odd-Lot" orders is that such orders must be entrusted by the customer's broker to the registered "Odd-Lot" dealer, who is responsible for the execution and the prices at which "Odd-Lots" orders are filled.

73. That "VANDEN" and/or "MR. LIEBER" and/or "SPEAR" and/or "KELLOGG" and/or "GRABOWSKI" either individually or in concert with one another, bunched two (2) "Odd-Lots" of 5 shares each of "SUPERIOR" stock, to sell them to plaintiff, as a "Round Lot," from its or his own account, maintained in the names "MRS. LIEBER" and "MRS. BRACH" at a manipulated high price, which was higher than the prevailing market at that time of the day, in violation of law, rules and regulations.

74. That the opening price, on November 30, 1962, for the first transaction in "SUPERIOR" on the New York Stock Exchange, was registered at \$1,132.00 per share.

75. That the closing price, on November 30, 1962, for "SUPERIOR" on the New York Stock Exchange was registered \$1,140.00 per share.

76. That the lowest price, registered for "SUPERIOR" stock on November 30, 1962, on the New York Stock Exchange, was \$1,130.00 per share.

77. That the highest price, registered for "SUPERIOR" stock on November 30, 1962, on the New York Stock Exchange, was \$1,140.00 per share.

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78. That the initial sale of ten (10) shares "SUPERIOR" at \$1,140.00 per share, on November 30, 1962, was made by "SPEAR" for its own account, to "MABON."

79. That the preceding sales transaction in "SUPERIOR" stock, prior to the alleged transaction between "MABON," and "SPEAR," of said 10 shares "SUPERIOR" at \$1,140.00 per share, was below \$1,140.00 per share.

80. That the preceding sales transaction in "SUPERIOR" stock, prior to the alleged transaction between "MABON" and "SPEAR" of said ten (10) shares "SUPERIOR" at \$1,140.00 per share, was at \$1,130.00 per share.

81. That the preceding sales transaction in "SUPERIOR" stock, prior to the alleged transaction between "MABON" and "VANDEN" and "GRABOWSKI" of said ten (10) shares "SUPERIOR" at \$1,140.00 per share, was a sale at \$1,130.00 per share.

82. That it was the duty and obligation of "SPEAR" and/or "GRABOWSKI" and/or "KELLOGG" to maintain an orderly market in "SUPERIOR" on November 30, 1962, and as plaintiff's sub-agents to try and to make every effort to buy for plaintiff twenty (20) shares "SUPERIOR" at the then prevailing market price in "SUPERIOR", and from disinterested third parties.

83. That "BOEBE," "LASS" and "SONN" in papers executed by them and submitted in the action of ERNEST KLEIN against

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WEINGARTEN & CO. and MABON, NUGENT & CO., in Supreme Court, Kings County on behalf of the defendants in said action, made untrue allegations which fraudulently concealed the true facts of the transactions which are the subject matter of this action.

84. These untrue allegations were in substance as follows:

85. That the stocks involved were bought in a general account, not a cash account.

86. That plaintiff agreed to pay for the stocks on the settlement date, regardless of delivery, when the fact was that payment was agreed to be made against delivery.

87. That plaintiff's telegram dated December 6, 1962, demanding delivery and instructing "MABON" not to sell the stocks, was received after the sale of the stocks, when in fact, the message was phoned in by Western Union to "MABON" at about 9 A.M. of December 6, 1962, before the sale and the opening of the market on the New York Stock Exchange.

88. That in said papers submitted as aforesaid "LASS" and "SONN" concealed the fact that neither "MABON" nor "WEINGARTEN" had physical possession of the stocks on the settlement date of December 6th.

89. That in said papers submitted as aforesaid, "LASS" and "SONN" knowingly concealed the non-bona fide transactions in the "SUPERIOR" stock by "MABON," "SPEAR", and "VANDEN."

90. That by mailing confirmation slips, sending a

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Western Union telegram to plaintiff demanding payment for stocks allegedly purchased, telephoning to plaintiff false information, defendant used the mails and other instrumentalities of transportation or communication in interstate commerce to make false material statements of act and omitted to state material facts all to mislead and defraud plaintiff and did so mislead and defraud plaintiff and engage in transactions which operated as a fraud upon plaintiff.

91. Plaintiff did not discover, nor could he with reasonable diligence have discovered until sometime in 1968, that the said price of \$1,140.00 per share was a fraudulent price and a manipulation by the defendants.

92. At the time of the alleged purchases and sales in November and December, 1962, plaintiff did not doubt, nor did he have any reason to doubt the accuracy of the report of the \$1,140.00 price per share for "SUPERIOR", as the then prevailing market price for that stock, and that it had been bought on the open market from a disinterested party.

93. The discovery came about in the following manner:

94. During the course of litigation in another action against the defendant "SPEAR", in connection with other transactions in "SUPERIOR" stock, at a different date, plaintiff became suspicious of the manipulations of "SPEAR," "KELLOGG" and "GRABOWSKI," in "SUPERIOR" stock generally. Such suspicion

Amended Complaint

led plaintiff to investigate and try to find out just what happened in the aforesaid trade, involving the 20 shares of "SUPERIOR" on November 30, 1962.

95. Accordingly, plaintiff inquired by letter, dated July 27, 1966, sent to "MABON" as to the name of the party from whom it purchased the "SUPERIOR" and "POLAROID" shares.

96. By letter dated June 29, 1966, "MABON" supplied to plaintiff names of two brokers from whom "MABON" bought the "SUPERIOR" stocks. Ten (10) of the "SUPERIOR" shares were alleged to have been bought from "SPEAR" and ten (10) of the "SUPERIOR" shares were alleged to have been purchased from "VANDEN."

97. During the latter part of 1966 and in 1967, plaintiff telephoned defendant "SPEAR" many times and inquired as to the name of the party on whose behalf the ten (10) "SUPERIOR" shares were sold to "MABON", and the price thereof, and said defendant said it would look up its records and let plaintiff know. Said defendant never contacted plaintiff with such information, although plaintiff repeated his inquiries.

98. During the latter part of 1966 and in 1967, plaintiff telephoned defendant "VANDEN" many times and inquired as to the name of the party on whose behalf the ten (10) "SUPERIOR" shares were sold to "MABON" and the price thereof, and said defendant said it would look up its records and let

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plaintiff know. Said defendant never contacted plaintiff with such information, although plaintiff repeated his inquiries.

99. Finally, in January, 1968, a Mr. Fitzpatrick of "VANDEN" advised plaintiff that he had no record of any such transaction, and suggested that plaintiff forward to him a copy of the trade confirmation slip of November 30, 1962, upon which he would investigate and give plaintiff the facts.

100. On January 23, 1968, plaintiff, accordingly, sent Mr. Fitzpatrick at "VANDEN," by Registered Mail, Return Receipt Requested, a copy of the said confirmation slip for the trade of twenty (20) shares "SUPERIOR" on November 30, 1962.

101. Plaintiff has received no reply from "VANDEN".

102. That after the failure of "VANDEN" to answer the registered letter of inquiry sent by plaintiff, as aforesaid, plaintiff's suspicions ripened into a belief that fraud had been practiced, although he did not as yet know the details of the defendants' fraudulent violations of the "1933 Act" and "1934 Act."

103. Thereafter plaintiff diligently researched in various libraries obtaining information from various publications as to the prices and transactions in "SUPERIOR" shares on November 30, 1962, on the New York Stock Exchange.

104. Plaintiff discovered by way of said research that the opening price for "SUPERIOR" on November 30, 1962, was

Amended Complaint

\$1,130.00 per share, the closing price, \$1,140.00 per share, and thus that plaintiff's order were allegedly executed at the highest price of the day.

105. Plaintiff then with due diligence instituted the within action.

106. Plaintiff since the institution of this action had made further discoveries of the fraudulent practices complained of.

107. Plaintiff also discovered in the course of litigation of the case of Klein v. Kenney, et al., 68 Civil 4970, that "SPEAR", while being a specialist, had been engaged in a course of conduct over the years of buying and selling "SUPERIOR" as a principal, using manipulative and deceptive devices and prices for its own account and benefit and in disregard of the interests of the public to maintain an orderly market in "SUPERIOR" stock.

108. This information, tied together with the results of plaintiff's investigation as hereinabove set forth, brought plaintiff to the belief that the instant transaction had been fraudulent within the purview of the "1933 Act" and "1934 Act."

109. That, by reason of the foregoing wrongful and fraudulent acts of defendant "NUGENT's" predecessor, "MABON," and of the defendants "NUGENT," "WEINGARTEN," "SPEAR", "KELLOGG", "GRABOWSKI," and "VANDEN," and as a result of the violations

Amended Complaint

as aforesaid, the plaintiff never received the said 20 shares of "SUPERIOR" and 100 shares of "POLAROID," stocks, and plaintiff sustained damages in the sum of \$112,318.81.

110. As a result of the fraudulent and wrongful representations, manipulations and violations, as aforesaid, plaintiff requests punitive damages in the sum of \$336,956.43.

* * *

WHEREFORE, plaintiff demands judgment:

(A) against defendants "SPEAR," "KELLOGG," "GRABOWSKI," "VANDEN," "NUGENT," and "WEINGARTEN," in the sum of ONE HUNDRED TWELVE THOUSAND THREE HUNDRED EIGHTEEN and 81/100 (\$112,318.81) DOLLARS, and for punitive damages in a sum of THREE HUNDRED THIRTY SIX THOUSAND NINE HUNDRED FIFTY SIX and 43/100 (\$336,956.43) dollars on the First Cause of Action;

(B) against defendants "SPEAR," "GRABOWSKI," "KELLOGG," and "THOMSON," in the sum of FORTY-FIVE THOUSAND (\$45,000.00) dollars, and for punitive damages in a sum to be assessed by the Court, on the Second Cause of Action;

(C) against defendants "SPEAR," "GRABOWSKI" and "KELLOGG" for punitive damages in a sum to be assessed by the Court, on the Third Cause of Action; and together with the interests, costs and disbursements of these actions.

DATED: Brooklyn, New York
August 21, 1959

ERNEST KLEIN
Plaintiff, Pro Se,
5517 - 15th Avenue
Brooklyn, N.Y. 11219
Telephone: UL 1-5390

DEFENDANTS-APPELLEES' NOTICE OF MOTION WITH PAPERS
ANNEXED THERETO FOR SUMMARY JUDGMENT AND OTHER
RELIEF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ERNEST KLEIN, :

Plaintiff, :

- against - : 68 Civil 5148, M.I.G.

SPEAR LEED & KELLOGG, JAMES CRANE :

KELLOGG, III, RAYMOND E. GRABOWSKI, : NOTICE OF MOTION

MABON NUGENT & CO., WEINGARTEN & :

CO., HERMAN LASS, LEW SONN, SIDNEY :

S. BOBBE, VANDEN BROECK LIEBER & :

CO., THOMSON & McKINNON, REYNOLDS & :

CO., and HERMAN FINS, :

Defendants. :

-----X

S I R S :

PLEASE TAKE NOTICE, that upon the amended complaint in this action, the decision of Judge Motley of this Court dated August 22, 1972, the order of Judge Motley entered on that decision, the judgment of the Court of Appeals, Second Circuit entered in this Court on April 25, 1973 affirming that order of Judge Motley, the complaint in the action entitled Klein v. Bache & Co., et al, 71 Civil 20, commenced by the plaintiff in this Court, all the proceedings heretofore had in that action and in an identically entitled counterpart action commenced by the plaintiff in the New York Supreme Court, Kings County, Index No. 20042/70, Kings County, and upon the annexed affidavit of Denis B. Sullivan, sworn to on May 10, 1974, the undersigned will move this Court before Hon. Murray I. Gurfein on May 27, 1974 at 10 A.M. as follows:

1. For summary judgment pursuant to Rule 56, FRCP, dismissing the First Cause of Action pleaded in the amended complaint upon the ground that no triable issue of fact remains to be tried in that First Cause of Action, and the moving defendants are now entitled to a judgment dismissing it as to them, and

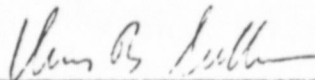
2. For an order pursuant to Rule 41, FRCP, dismissing the Second Cause of Action pleaded in the amended complaint as to the moving defendants upon the grounds that the plaintiff commenced a later action in this Court against those defendants entitled Klein v. Bache & Co., et al, 71 Civil 20, in which exactly the same claims of wrongdoing are alleged against the moving defendants as are alleged against them in the Second Cause of Action asserted in this action: and that the plaintiff has been guilty of gross and inexcusable neglect in proceeding with the prosecution of the Second Cause of Action since the date this action was commenced on December 28, 1968, and

3. For such other and different relief as to this Court may seem just and proper.

Dated: New York, New York
May 10, 1974

Yours, etc.,

REAVIS & McGRATH

By 

Denis B. Sullivan

Attorneys for the moving defendants,
Spear Leeds & Kellogg, James Crane
Kellogg III, and Raymond E.
Grabowski
1 Chase Manhattan Plaza
New York, New York 10005
(212) 269-7600

TO:

Gainsburg, Gottlieb, Levitan & Cole
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017

Satterlee, Warfield & Stephens
Attorneys for Defendant Vanden Broeck, Lieber & Co.
277 Park Avenue
New York, New York 10017

Hall, McNicoll, Marett & Hamilton
Attorneys for Defendant Thomson & McKinnon, Inc.
41 East 42nd Street
New York, New York 10017

Frank R. Greenberg, Esq.
Attorney for Bache & Co.
80 Broad Street
New York, New York 10004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

ERNEST KLEIN, : 68 Civil 5148, M.I.G.

Plaintiff, :

-against- :

AFFIDAVIT

SPEAR, LEEDS & KELLOGG, JAMES CRANE :
KELLOGG, III, RAYMOND E. GRABOWSKI, :
MABON NUGENT & CO., WEINGARTEN & CO., :
HERMAN LASS, LEW SOHN, SIDNEY S. :
BOBBE, VANDEN BROECK LIEBER & CO., :
THOMSON & MCKINNON, REYNOLDS & CO., :
and HERMAN FINS, :

Defendants. :

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

DENIS B. SULLIVAN, being duly sworn, deposes and
says:

1. I am a member of the firm of Reavis & McGrath, attorneys for the defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski (the Kellogg defendants). This action is one of 11 commenced in this Court by the plaintiff against those defendants. In addition, 12 other actions were commenced by this plaintiff against those defendants in the New York Supreme Court, Kings County. For the most part those state court actions are counterparts of the actions commenced in this Court. The only substantial difference between most of them is that in this Court the

activities complained about are alleged to violate certain provisions of the Securities Act of 1933 and of the Securities Exchange Act of 1934, whereas the state court actions are common-law fraud actions. Two such actions in which the same activities are complained about are this action and an identically entitled state court action which bears Index No. 3283/69, Kings County.

2. I handled the defense of all those actions on behalf of the Kellogg defendants, and I am personally familiar with all that occurred in them, including all that occurred in this action. I submit this affidavit in support of the relief sought in the annexed Notice of Motion.

3. This action was commenced in this Court on December 28, 1968 more than five and one-half years ago, and the identically entitled state court action was commenced a few days earlier.

4. The original complaints in both of those actions charged in separate claims that the defendants defrauded the plaintiff by buying or selling for his account on the New York Stock Exchange, shares of stock of Superior Oil Co., concerning which the Kellogg defendants are the New York Stock Exchange specialists charged with the duty of endeavoring to maintain an orderly market for that stock on that exchange. The plaintiff claims that the trades made for his account were made at fictitious prices above or below the true market value of the shares arrived at by fraudulently manipulating the prices at which Superior Oil Co. stock was selling on the dates the trades were made.

5. This action was heretofore the subject of two decisions of Judge Cooper of this Court reported in 306 F. Supp. 743 (1969) and 309 F. Supp. 341 (1970). Both of those decisions speak for themselves and this Court is respectfully referred to them for all that is contained therein.

6. In the first of those decisions reported in 306 F. Supp. 743, the claims asserted in the First Cause of Action were completely dismissed as to the individual defendants, Messrs. Bobbe, Lass, and Sonn, and were virtually dismissed as to the defendants Weingarten & Co. and Mabon Nugent & Co. (hereinafter called the Weingarten defendants) upon the ground of collateral estoppel based upon an earlier decision obtained by those defendants in another action commenced against them by this plaintiff in the Supreme Court, Kings County. However, the claims asserted in the First Cause of Action were not completely dismissed as to those defendants, nor were they dismissed as to the Kellogg defendants, or as to the defendant, Vanden Broeck, Lieber & Co., the only other defendants sued in the First Cause of Action.

7. In that same first decision the plaintiff was directed to serve an amended complaint under penalty of having the entire First Cause of Action dismissed on Statute of Limitations grounds if he failed to do so.

8. That First Cause of Action, as amended, is now the subject of the instant motion made on behalf of the Kellogg defendants.

9. Also involved in that first decision of Judge

Cooper were claims asserted in the Second Cause of Action against the Kellogg defendants and the defendant, Thomson & McKinnon, the only defendants sued in that Second Cause of Action. Motions to dismiss that cause of action on Statute of Limitations grounds were denied.

10. Like the First Cause of Action, that Second Cause of Action as amended is also the subject of the instant motion.

11. The second decision of Judge Cooper reported in 309 F. Supp. 341 was handed down after the service of the amended complaint ordered in the first decision. In it the action was dismissed insofar as it sought recovery of punitive damages upon the ground that punitive damages would not be recovered in this action. In addition, a Third Cause of Action pleaded in the amended complaint against the Kellogg defendants only was dismissed for the reasons stated in the second decision.

12. An appeal taken by the plaintiff from that second decision of Judge Cooper was dismissed for lack of jurisdiction by our Court of Appeals in an order dated October 26, 1970, a copy of which is annexed hereto as Exhibit A.

13. Since the date of that order of our Court of Appeals the plaintiff has done absolutely nothing to proceed with the diligent prosecution of this action as he was required to do, except to serve notices of examinations before trial of the Kellogg defendants which never went forward because the plaintiff failed to appear for his examination

before trial pursuant to a notice previously served upon him. In addition the only other step taken by the plaintiff was to serve interrogatories to be answered by the Weingarten defendants who at the time were parties to the First Cause of Action only.

14. In the counterpart identically entitled action commenced by the plaintiff in the Supreme Court, Kings County, the Kellogg defendants obtained an order entered on January 21, 1972, a copy of which is annexed hereto as Exhibit B, dismissing the First and Third Causes of Action alleged against them in a similar amended complaint, which order also stayed the plaintiff from proceeding in that court with the prosecution of his Second Cause of Action pleaded in the similar amended complaint until the final determination of that cause of action by this Court in this action.

15. On or about February 18, 1974 the plaintiff served a notice of appeal to the Appellate Division, Second Department, from that order entered on January 21, 1972, but to date, more than two years later, he has failed to perfect and go forward with that appeal and it apparently has been abandoned by the plaintiff.

Motion for dismissal of First Cause of
Action as to the Kellogg Defendants

16. Following the dismissal by our Court of Appeals of the appeal taken by the plaintiff from the second decision of Judge Cooper mentioned above, the Weingarten defendants renewed their motion for summary judgment dismissing the claims asserted in the First Cause of Action as to them.

That motion was granted by Judge Motley of this Court in a decision dated August 22, 1972, a copy of which is annexed hereto as Exhibit C. The order entered on that decision of Judge Motley is annexed hereto as Exhibit D. An appeal taken by the plaintiff from that order was affirmed by our Court of Appeals in a judgment entered in this Court on April 25, 1973, a copy of which is annexed hereto as Exhibit E.

17. It is principally on the strength of that decision of Judge Motley, as affirmed by our Court of Appeals, that we now seek summary judgment dismissing the First Cause of Action as to the Kellogg defendants as well.

18. On file with this Court is the amended complaint which is most prolix consisting as it does of some 174 Paragraphs. The First Cause of Action is contained in Paragraphs 25 through 110 inclusive. Concerning that Cause of Action Judge Motley stated in her decision:

"The claim against the moving defendants stems from a purchase of securities for the plaintiff in 1962 by the defendants as broker-defendants, a transaction these defendants undoubtedly now deeply regret. Klein had opened an account and deposited \$1,000 with Weingarten & Co. At Klein's direction Weingarten caused 20 shares of Superior Oil Co. stock to be purchased for his account at \$1,140 per share. He was notified of the purchase and asked to pay the balance of the purchase price. When he did not the stock was sold for his account at a net loss of \$151.97. Weingarten then returned the balance of his \$1,000 deposit to Klein.

Klein charges in his prolix amended complaint, that the defendants manipulated the execution of the order of said 20 shares of Superior ... also manipulated the prices to be fixed at higher prices than the prevailing market price was at the time for

Superior stock', Amended Complaint ¶46. The lowest price for Superior stock on November 30, 1962 the day of the trade was \$1,130 and the highest was \$1,140. The maximum possible damages Klein would therefore have suffered if defendants purchased the shares above the prevailing market rate was \$10 per share, or \$200."

19. As the amended complaint will reveal the only involvement the Kellogg defendants had in the aforesaid purchase transaction is that it is claimed that they sold 10 of the 20 shares to the Weingarten defendants at the alleged manipulated price of \$1,140 per share. The other 10 shares, it is claimed, were sold by the defendant, Vanden Broeck, Lieber & Co. (See Amended Complaint, Paragraphs 44, 45 and 46.) Yet as Judge Motley found, the plaintiff did not pay any price for the 20 shares. Instead they were sold for his account by the Weingarten defendants at a net loss of \$151.97 which was deducted from the \$1,000 deposit the plaintiff had made, and the balance was returned to him, and apparently was accepted by him.

20. Thus, insofar as the Kellogg defendants are concerned it is a matter of indifference whether they did or did not sell 10 shares to the Weingarten defendants at a manipulated price of \$1,140 per share as claimed by the plaintiff, since that sale could not possibly have caused any of the damages claimed to have been sustained by the plaintiff. He refused to and did not pay any price for the 10 shares except only indirectly, and then only to the extent of one half of the net loss of \$151.97 sustained by the Weingarten defendants, when they sold the 20 shares for the plaintiff's account.

21. In any event the question presented by this

motion is the same question that was presented to Judge Motley in the motion decided by her. Does the plaintiff have any proof sufficient to warrant a trial that the price of \$1,140 per share for the 20 shares of Superior Oil stock was a manipulated price above the prevailing market price at the time the trade was made, as he claims it was? In deciding this question in favor of the Weingarten defendants, Judge Motley stated:

"Defendants contend that there was no manipulation of the purchase price. Klein's answers to defendants' interrogatories demonstrate that he has absolutely no personal knowledge that the purchase price was anything other than the prevailing one. He cannot set forth specific facts showing that there is a genuine issue for trial. Rule 56(e) Fed. R. Civ. P."

Later in the same decision Judge Motley went on to state:

"It is impossible to avoid the conclusion that Klein did not have any basis in fact to believe there was a manipulation of the price of the Superior stock. He has had over three years since the filing of his original complaint and over 2 1/2 years since the filing of his amended complaint to give life to his phantasmagoric allegations; that is long enough.

Since we find no issue of fact remaining on the first cause of action, defendants are entitled to judgment dismissing the first cause of action."

22. For the exact same reasons we now respectfully submit that the Kellogg defendants are also entitled to a judgment dismissing the First Cause of Action to them. As the amended complaint plainly reveals those defendants were joined as defendants in the First Cause of Action only because it is claimed that they sold 10 of the 20 shares of Superior Oil stock to the Weingarten defendants a manipulated price above the

then prevailing market price. And as Judge Motley found, the plaintiff not only failed to pay that price, or any other price for the 10 shares, but he has utterly failed to produce any proof whatsoever sufficient to warrant a trial that the price of \$1,140 per share was in fact a manipulated price. He had more than sufficient time since this action was commenced in December, 1968, more than five and one half years ago, to produce some proof in that regard upon which he would rely but he was completely unable to do so. It follows that his charge that the price was a manipulated price is indeed "phantasmagoric" as found by Judge Motley.

23. Moreover, as we pointed out above, the exact same First Cause of Action asserted by the plaintiff in his counterpart to this action commenced in the Supreme Court, Kings County, was dismissed by that court in an order entered on January 21, 1972. (See Exhibit B). In the course of its unreported decision granting that relief, the state court discussed the requirements of the New York law concerning the doctrines of res adjudicata and collateral estoppel, and stated:

"In this action both requirements are present. Clearly the Kellogg defendants' posture is identical to that of Weingarten & Co., etc. It already having been determined that there is no basis for any claim against Weingarten, it follows that the action against movants, the Kellogg defendants must also fail. On the basis of the determination already made, it is clear that the doctrines of res adjudicata and collateral estoppel bars plaintiff from prosecuting the first cause of action against movants." (See NYLJ dated January 13, 1972, for decision of Liebowitz J at Special Term Part 1, Kings County.)

24. For all the foregoing reasons we respectfully urge that this part of our motion be granted upon the ground that as in the case of the Weingarten defendants no genuine issue of fact remains to be tried as to the Kellogg defendants concerning the issues raised in the First Cause of Action, and upon the further ground that the doctrines of res adjudicata and collateral estoppel are in any event a complete bar to the prosecution of that cause of action for the reasons that prompted the aforementioned state court decision dismissing that cause of action as to the Kellogg defendants.

Motion for dismissal of Second Cause of Action
as to the Kellogg Defendants

25. This part of our motion addressed to the Second Cause of Action pleaded in the amended complaint seeks its dismissal as to the Kellogg defendants on these two grounds: first, that the activities complained of in that cause of action are the subject of a later action commenced by the plaintiff in this Court entitled Klein v. Bache & Co., et al, 71 Civil 20, and second, that the plaintiff has apparently abandoned the Second Cause of Action in favor of that later action since he has utterly failed to proceed with his prosecution of the Second Cause of action against the Kellogg defendants since its commencement on December 28, 1968 more than five and one half years ago.

26. Attached hereto as Exhibit F, is a copy of the complaint in the later Klein v. Bache & Co. action mentioned above. As revealed therein, exactly the same claims of wrong-

doing are alleged therein against the Kellogg defendants as are alleged against those defendants in the Second Cause of Action asserted in the amended complaint in this action. The only real difference between them is that Bache & Co. is named as a co-defendant with the Kellogg defendants in the Bache & Co. action, whereas the defendant Thomson & McKinnon is named as a co-defendant in the Second Cause of Action in this action. That Second Cause of Action in this action is set forth in Paragraphs 111 through 135, inclusive, of the prolix amended complaint.

27. In addition the claims asserted in the aforementioned Klein v. Bache & Co. action commenced in this Court are exactly the same as the claims asserted by the plaintiff in an identically entitled action commenced by him in the Supreme Court, Kings County, Index No. 20042/70, Kings County.

28. The only difference between the action commenced in this Court and the action commenced in the state court is that in this Court the activities complained about are alleged to violate certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, whereas the state court action is a common-law fraud action.

29. For that reason both the Kellogg defendants and the defendant Bache & Co., sought and obtained an order from the late Judge McLean of this Court staying the further prosecution of the action commenced in this Court until the final determination of the state court action. An appeal taken by the plaintiff from that stay order to our Court of Appeals resulted in a decision of our Court of Appeals affirming the stay order. A copy of the stay order is annexed hereto as

Exhibit G, and a copy of the order of affirmance is annexed hereto as Exhibit H.

30. In the identically entitled state court action which Judge McLean of this Court directed to be disposed of first, the Kellogg defendants obtained from Mr. Justice Cone of that court an order entered on March 2, 1971, a copy of which is attached hereto as Exhibit I, dismissing the state court action as to those defendants on res adjudicata grounds in that the counterpart action to the instant action also entitled Klein v. Spear Leeds & Kellogg commenced in the state court had been dismissed on the merits as to those defendants. In his decision granting that motion, a copy of which is attached hereto as Exhibit J, Mr. Justice Cone rejected a contention made by the plaintiff that the Second Cause of Action pleaded by the plaintiff in the Klein v. Spear Leeds & Kellogg action was entirely different than the claims pleaded in the Klein v. Bache & Co. action, stating:

"Plaintiff has endeavored to avoid the implication of the earlier judgment by dropping a defendant and slightly varying some of the causes of the complaint in insignificant detail. In essence the causes of action are based on the same transactions and the issues remain the same."

31. Thus, there has been a judicial finding by the state court that the claims asserted in the instant Second Cause of Action are virtually identical to the claims asserted in the Klein v. Bache & Co. action, which Judge McLean of this Court also recognized when he stayed the further prosecution of the identically entitled Klein v. Bache & Co. action commenced in this Court until the final determination of the state

court action.

32. Thereafter, after the plaintiff succeeded in obtaining from the Appellate Division, Second Department, an order modifying the order that dismissed the counterpart Klein v. Spear Leeds & Kellogg action commenced in the state court, and granted the plaintiff permission to serve an amended complaint in that action, the plaintiff moved for re-argument of the decision of Mr. Justice Cone which resulted in the aforementioned order dismissing the counterpart Klein v. Bache & Co. action on res adjudicata grounds, claiming that the basis for that order no longer existed in view of the Appellate Division decision which granted him permission to serve an amended complaint in the counterpart Klein v. Spear Leeds & Kellogg action commenced in that court.

33. That re-argument motion was denied by Mr. Justice Cone in a decision dated June 1, 1973 a copy of which is attached hereto as Exhibit K. In the course of that decision the court stated:

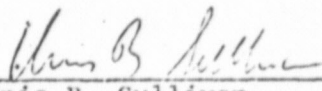
"Considering all the factors involved and the additional fact that the plaintiff had instituted an action in the Federal Court based on the same facts, presently suspended until a final declaration in this court of this action, I now hold that this action is ended. This will enable the plaintiff to apply to the U.S. District Court to set aside the suspension so that he may prosecute it there, if that court is favorably disposed to such application."

34. Thus, the state court paved the way and invited the plaintiff to take the steps needed to be taken to enable him to resume his prosecution of the counterpart Klein v. Bache

& Co. action commenced in this Court.

35. However, the plaintiff did not do so. Instead of proceeding as Mr. Justice Cone suggested he might do, the plaintiff elected on or about June 25, 1973 to serve a notice of appeal from the order of Mr. Justice Cone entered on the above decision on June 19, 1973. To date, almost a year later, the plaintiff has utterly neglected to perfect that appeal and to go forward with it, probably because he knows that an appeal does not lie from an order denying a re-argument motion.

36. We respectfully urge therefore, that the Second Cause of Action asserted in the amended complaint in this action now be dismissed as to the Kellogg defendants upon the grounds (a) that the plaintiff commenced a later action in this Court entitled Klein v. Bache & Co., et al, 71 Civil 20, in which exactly the same claims are asserted against those defendants as are asserted in the Second Cause of Action alleged in the amended complaint in this action; and (b) that the plaintiff has been guilty of gross and inexcusable neglect in proceeding with the prosecution of the Second Cause of Action since the date this action was commenced on December 28, 1968, more than five and one half years ago.



Denis B. Sullivan

Sworn to before me this

10th day of May, 1974.

Notary Public

THERESA CARERI
Notary Public, State of New York
No. 24-4506345
Qualified in Kings County
Commission Expires March 30, 1975

EXHIBIT A

United States Court of Appeals

DOCKETED

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October one thousand nine hundred and seventy.

Present: HON. LEONARD P. GARDNER,

HON. HENRY J. FREEDMAN,

HON. ARLEN C. ADAMS,

Circuit Judges.

Ernest Klein,

Plaintiff-Appellant,

v.

Spear, Leeds & Kellogg, et al.,

Defendants-Appellees.

Mabon, Bagent & Co., and

Weingarten & Co.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from orders of said District Court be and it hereby is dismissed for want of jurisdiction with costs to be taxed against the appellant.

A. DANIEL FURMAN
Clerk

EXHIBIT B

At a Special Term, Part I,
of the Supreme Court of
the State of New York,
held in and for the
County of Kings, at the
Courthouse, Civic Center,
Brooklyn, New York, on
the 21st day of January,
1972

Present:

Hon. Simon J. Liebowitz,
Justice.

----- X

ERNEST KLEIN,

Plaintiff,

- against -

SPEAR, LEEDS & KELLOGG, JAMES CRANE
KELLOGG III, RAYMOND E. GRABOWSKI,
VANDEN BROECK, LIEBER & CO., and
THOMSON & Mc KENNON,

Defendants.

----- X

Index No. 8283/69

ORDER

The defendants, Spear Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski, having moved this Court (1) for summary judgement pursuant to Rule 3212, CPLR, dismissing the first cause of action alleged in the amended complaint upon the ground that the plaintiff is barred by the doctrines of res adjudicata and collateral estoppel from prosecuting that cause of action; (2) for summary judgement pursuant Rule 3212, CPLR, dismissing the third cause of action alleged in the amended complaint upon the ground that it was heretofore dismissed, with prejudice, as to those defendants by an order of this Court entered on January 6, 1970, which order was not reversed or modified in any way by the Appellate Division, Second Department,

in its order dated June 21, 1971; and (3) for an order pursuant to Rule 3211, CPLR, either dismissing the second cause of action alleged in the amended complaint, or staying its further prosecution until the final determination of another action commenced by the plaintiff in the United States District Court, Southern District of New York, upon the ground that the parties to that other action are the same, that the activities complained of are the same, and that the plaintiff could obtain the full relief sought in the second cause of action in that other action; and said motion having come on to be heard by this Court, and this Court having handed down a decision granting the motion,

Now, upon reading and filing the Notice of Motion dated August 11, 1971, the affidavit of Denis B. Sullivan sworn to on August 11, 1971, together with exhibits A, B, C, D, E, F, G, H and I submitted therewith, the supplemental affidavit of Denis B. Sullivan sworn to on November 1, 1971, together with exhibits J, K and L attached thereto, and the reply affidavit of Denis B. Sullivan, sworn to on December 3, 1971, all submitted in support of the motion, and the affidavit of Ernest Klein sworn to on November 29, 1971, and exhibit 1 attached thereto, submitted in opposition to the motion; and after hearing Reavis & McGrath, attorneys for the moving defendants (Denis B. Sullivan, of counsel) in support of the motion, and Ernest Klein, Plaintiff Pro Se, in opposition to the motion, and upon filing the decision of this Court, it is on motion of Reavis & McGrath, attorneys for the moving defendants,

Ordered, that the first cause of action alleged in the amended complaint be and the same hereby is ^{swered and} dismissed, with
A

prejudice, as to the defendants Spear Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski; and it is further

Ordered, that the third cause of action alleged in the amended complaint be and the same hereby ^{is} dismissed, with prejudice, as to the defendants Spear, Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski; and it is further

Ordered, that the plaintiff be and he hereby is stayed for all purposes from prosecuting the second cause of action alleged in the amended complaint until the final determination by the United States District Court, Southern District of New York, of the second cause of action alleged in the complaint in the action commenced in that court entitled "Ernest Klein v. Spear Leeds & Kellogg" et al; and it is further

Ordered, that the Clerk of this Court be and he hereby is directed to enter a judgement in this action dismissing the first and third causes of action alleged in the amended complaint as to the defendants, Spear Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski, with prejudice, and with costs in favor of those defendants as taxed by the Clerk of this Court.

ENTER

S J L

J. S. C.

*Granted
Jan 21, 1972
ANTHONY N. DURSO
clerk*

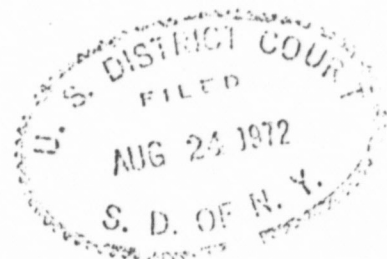
*Above order signed with changes as noted. Served
by mail with return filing on 2/1/72*

WBS

EXHIBIT C

MEMORANDUM-OPINION ON MOTION TO DISMISS
 BY JUDGE MOTLEY, DATED AUGUST 22, 1972,
FILED AUGUST 24, 1972.

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK



----- x
 ERNEST KLEIN,

Plaintiff,

-v-

68 CIV. 5148

SPEAR, LEEDS & KELLOGG, et al.,

Defendant.

APPEARANCES

ERNEST KLEIN
 5517 158th Avenue
 Brooklyn, New York 11219

Plaintiff Pro Se

SIDNEY S. BORNE
 36 West 44th Street
 New York, New York 10036

Attorney for defendants
 Mahon, Nugent & Co., and Weingarten & Co.

CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion on
Motion to Dismiss

The original complaint in this action was filed on December 27, 1968. On July 23, 1969 Judge Cooper granted summary judgment dismissing the first cause of action of that complaint, but granted plaintiff leave to amend, 306 F.Supp. 743 (S.D.N.Y. 1969). Plaintiff filed his amended complaint on August 21, 1969. Defendants moved for summary judgment on the first cause of action in the amended complaint on the ground that the statute of limitations had run. Judge Cooper denied this motion on January 20, 1970, but did strike plaintiff's demand for punitive damages on the first count and restricted the issues on which plaintiff could state a claim in count one, 309 F.Supp. 341 (S.D.N.Y. 1970).

Defendants Hahon, Regent & Co. and Weingarten & Co. now move for summary judgment on the first cause of action of the amended complaint on the ground that there is no material dispute of fact and that plaintiff has not established a claim.

The claim against the moving defendants stems from a purchase of securities for plaintiff in 1962 by defendants as broker-defendants, a transaction these defendants undoubtedly now deeply regret. Klein had opened an account and deposited \$1,000 with Weingarten & Co. At Klein's direction Weingarten

caused 20 shares of Superior Oil stock to be purchased for his account at \$1,140 a share. He was notified of the purchase and asked to pay the balance of the purchase price. When he did not the stock was sold for his account at a net loss of \$151.97. Weingarten then returned the balance of his \$1,000 deposit to Klein.

Klein charges, in his prolix amended complaint, that defendants "manipulated the execution of the order of said 20 shares of Superior. . .also manipulated the price to be fixed at higher prices than the prevailing market price was at the time for Superior stock" (amended complaint ¶ 46). The lowest price for Superior stock of November 30, 1962, the day of the trade, was \$1,130 and the highest was \$1,140. The maximum possible damages Klein could therefore have suffered if defendants purchased the shares above the prevailing market rate was \$10 per share, or \$200.

Defendants contend that there was no manipulation of the purchase price. Klein's answers to defendants' interrogatories demonstrate that he has absolutely no personal knowledge that the purchase price was anything other than the prevailing one. He cannot set forth specific facts showing that there is a genuine issue for trial. Rule 56(c) Fed. R. Civ. P.

In response to defendants' motion Klein requests an adjournment or stay until he receives answers to a set of

interrogatories served on Haddon, Nugent & Co. on March 29, 1972.^{1/} Though he apparently seeks to invoke Rule 56(f), he has not made the slightest showing why he has waited over 2 1/2 years after filing the amended complaint before initiating the discovery which would produce the facts that are the very essence of his complaint.

To take advantage of Rule 56(f) a party must state genuine and convincing reasons for his inability to state the facts which are in dispute. Robin Construction Co. v. United States, 345 F.2d 610, 614 (3d Cir. 1965). Klein was obligated to utilize discovery to discern facts supporting his claim; "suspicion alone without discovery is not enough." Id.; Schneidman v. McKesson & Robison, Inc., 254 F.2d 927, 931 (2d Cir. 1958). A party who has sorely neglected to utilize discovery before the summary judgment motion is not entitled to a further extension. Cf. Malvern v. Citicor Service Oil Co., 361 F.2d 671 (2d Cir. 1966), aff'd sub. nom. First National Bank of Arizona v. Citicor Service Co., 391 U.S. 253 (1968).

It is impossible to avoid the conclusion that Klein did not have any basis in fact to believe there was a manipulation of the price of the Superior stock. He has had over three years since the filing of his original complaint and over 2 1/2 years since the filing of his amended complaint to give life to his

phantasmagoric allegations; that is long enough.

Since we find no issues of fact remaining on the first cause of action, defendants are entitled to judgment dismissing the first cause of action.

Submit order on 5 days' notice.

Dated: New York, New York

August 22, 1972

Constance Baker Motley

CONSTANCE BAKER MOTLEY
U.S.D.J.

FOOTNOTES

1. Klein served a notice to take deposition upon these defendants on December 29, 1971. In response, they moved for a protective order, and Judge Gagliardi by order of March 9, 1972 limited Klein's method of discovery to interrogatories. The March 29, 1972 interrogatories followed.

ORDER, FILED SEPTEMBER 5, 1972, GRANTING SUMMARY
JUDGMENT, APPEALED FROM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....

ERNEST KLEIN,

Plaintiff,

-against-

SPEAR, LEEDS & KELLOGG, JAMES CRANE
KELLOGG III, RAYMOND E. GRABOWSKI,
MABON, NUGENT & CO., WEINGARTEN & CO.,
VANDEN BROECK, LIEBER & CO. and
THOMSON & MCKINNON,

60 Civ. 5148

ORDER
GRANTING SUMMARY
JUDGMENT

Defendants.

.....

The defendants Mabon, Nugent & Co. and Weingarten & Co. having moved this Court, by notice of motion dated February 18, 1972, for an order granting them summary judgment dismissing the complaint and for the costs of the action, and counsel fees; and said motion having come on to be heard before the undersigned on April 4, 1972; upon the amended complaint; the answer of said defendants thereto; the interrogatories submitted to the plaintiff; his answers thereto; the affirmation of Sidney S. Bobbé dated February 18, 1972 and the further affirmation of Sidney S. Bobbé dated August 28, 1972; and after hearing Sidney S. Bobbé, attorney for said moving defendants, in support of said motion, and the plaintiff, appearing pro se, in opposition thereto, together with plaintiff's affidavit verified April 3, 1972 in support of his application to adjourn the hearing of the motion or to stay the same, which application was denied on the ground that the motion had previously been adjourned from the original return date of March 7, 1972, to April 4, 1972, peremptorily against the plaintiff; and due deliberation having been had, and

the Court having filed its decision in writing dated August 22, 1972; it is

CBM ORDERED that the motion of said defendants be and the same hereby is in all respects granted; and the Clerk of this Court is directed to enter judgment dismissing the first cause of action, against said defendants, contained in the amended complaint, together with costs and counsel fees in the sum of \$~~.....~~; and it is

FURTHER ORDERED that the action be severed and continued as against the remaining defendants named in the amended complaint.
Dated New York, August 29, 1972.

Constance Baker Motley
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
ERNEST KLEIN, :
 :
Plaintiff-Appellant, :
 :
-against- :
 :
SPEAR, LEEDS & KELLOGG, et al., :
 :
Defendants, :
 :
MABON, NUGENT & CO. and :
WEINGARTEN & CO., :
 :
Defendants-Appellees. :
----- X

COURT OF APPEALS
DOCKET NO. 72-2205
APR 25 1973

DOCKETED AS
A JUDGMENT 73,406
ON APR 25 1973

ERNEST KLEIN, the plaintiff-appellant above named, having appealed to this Court by notice of appeal dated April 4, 1972, from an order filed in the United States District Court for the Southern District of New York on February 3, 1972, whereby Hon. Murray I. Gurfein, District Judge, ordered the plaintiff to pay to the appellees the sum of \$200 costs; and said appellant also having appealed to this Court, by notice of appeal dated September 15, 1972, from an order filed in said District Court on September 5, 1972, whereby Hon. Constance Baker Motley, District Judge, granted to the appellees above named summary judgment dismissing the first cause of action as alleged against them in the amended complaint; and said appellant having also appealed to this Court, by notice of appeal dated October 6, 1972, from an order filed in said District Court on September 21, 1972, whereby Hon. Morris E. Lasker, U. S. District Judge, granted defendant a stay from further

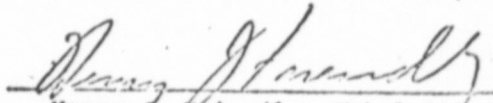
proceedings; and said appeals having come on to be heard before this Court on a consolidated appendix for argument on March 26, 1973, and after hearing Richard Joel Rubin, Esq., of counsel to appellant, in support of said appeals, and Sidney S. Bobbe, attorney for appellees, in opposition, it is hereby

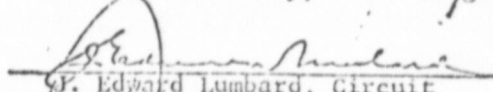
ORDERED AND ADJUDGED that the aforesaid order granted by Hon. Murray I. Gurfein be and the same hereby is affirmed; and it is

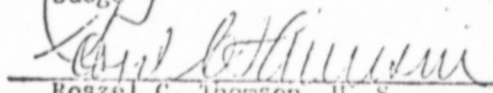
FURTHER ORDERED AND ADJUDGED that the aforesaid order granted by Hon. Constance Baker Motley be and the same hereby is affirmed; and it is

FURTHER ORDERED AND ADJUDGED that the appeal from the aforesaid order granted by Hon. Morris E. Lasker be and the same hereby is dismissed as moot.

March , 1973.


Henry J. Friendly, Chief Judge


J. Edward Lumbard, Circuit Judge


Roszel C. Thomsen, U. S. District Judge

(A true copy.

A. David Tressant
-2-

clerk

By Vincent J. Carls
clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	:	71 Civil 20
ERNEST KLEIN,	:	No. _____ 1970
	:	
Plaintiff,	:	<u>CIVIL ACTION</u>
	:	
- against -	:	<u>JURY TRIAL</u>
	:	<u>REQUESTED</u>
EACHE & CO., INC., SEPAR, LEEDS & KELLOGG,	:	
JAMES CRANE KELLOGG III, PAYMENT F. GRAEWSKI,	:	
AND AMERICAN BANK & TRUST COMPANY	:	<u>COMPLAINT</u>
	:	
Defendants.	:	
-----x	:	

Plaintiff, pro se, complaining of the defendants and requesting a Jury Trial, respectfully alleges on information and belief:

1. This is an action for damages resulting from violations of the provisions of the Securities Exchange Act of 1934 ("1934 Act"), and Regulations T and U, issued by the Board of Governors of the Federal Reserve System, pursuant to the "1934 Act"; and from violations of the Securities Act of 1933 ("1933 Act"), 15 U.S.C.A. Section 77q, 78g; 78j.

2. Exclusive jurisdiction of this action is conferred on this Court under the "1934 Act" (63 Stat. 107, 15 U.S.C.A. Section 78aa).

3. As to those theories of relief based upon New York law, upon the pendent jurisdiction of this Court.

4. Venue is properly laid in the Southern District of New York, because at all times relevant hereto, all defendants resided or maintained offices for the regular transaction of business in this District. Additionally, venue in this District is proper because the acts or transactions constituting the violations of said acts and transactions as hereinafter alleged occurred in this District.

5. The plaintiff's claim, and the matter in controversy herein, exceeds, exclusive of interest and costs, the sum of TEN THOUSAND (\$10,000.00) DOLLARS.

6. Plaintiff, ERNEST KLEIN, at all times relevant hereto, has been a resident of the City and State of New York.

7. That defendant, EACHE & CO., INC., (hereinafter "EACHE"), is and at all times relevant hereto was a domestic corporation organized in the State of New York and existing and doing business under and by virtue of the laws of the State of New York, and engaged in the business as brokers and dealers

in securities registered with the Securities and Exchange Commission ("SEC") under Section 15 (b) of the Securities Exchange Act of 1934, 15 U. S. C. Section 77.

8. That defendant "EACHF" is and was a member organization of the New York Stock Exchange, a National Securities Exchange.

9. That defendant "EACHE" is and was a member of the National Association of Securities Dealers, an organization registered with the "SEC" pursuant to Section 15 of the "1934 Act" as amended.

10. That defendant "EACHE" maintains and at all times relevant hereto maintained, its principal office of business in the City, State and Southern District of New York.

11. That defendant SPEAR, LEEDS & KELLOGG (hereinafter "SPEAR"), is, and at all times relevant hereto was a partnership engaged in the business as brokers and dealers in securities registered with the "SEC" under Section 15 (b) of the "1934 Act"; 15 U.S.C., Section 77.

12. That "SPEAR" is and was a member organization of the New York Stock Exchange, a National Securities Exchange.

13. That defendant "SPEAR" is and was a member of the National Association of Securities Dealers, Inc., an organization registered with the "SEC" pursuant to Section 15 of the "1934 Act".

14. That defendant "SPEAR" maintains, and at all times relevant hereto maintained a principal office in the City, State and Southern District of New York.

15. That defendant, JAMES CRANE KELLOGG III (hereinafter "KELLOGG"), is and at all times relevant hereto was a member of the New York Stock Exchange.

16. That defendant "KELLOGG" is and was one of the specialists handling the stock of Superior Oil of California (hereinafter "SUPERIOR"), on the New York Stock Exchange.

17. That defendant "KELLOGG" is and was a member of the firm of "SPEAR"

18. That, at all times relevant hereto, defendant RAYMOND F. GRAPOWSKI (hereinafter "GRAPOWSKI"), was a partner and a member of the firm of defendant "SPEAR."

19. That defendant "GRABOWSKI" was one of the specialists handling the stock of "SUPERIOR" on the New York Stock Exchange.

20. That at all times hereinafter mentioned, defendant AMERICAN BANK & TRUST COMPANY (hereinafter "AMERICAN BANK"), was and still is a domestic banking corporation organized and existing by and under the laws of the State of New York.

21. That defendant "AMERICAN BANK" is the successor of one AMERICAN TRUST CO. (hereinafter "FORMER AMERICAN"), who, at all times relevant hereto, was a domestic banking corporation organized and existing by and under the laws of the State of New York, and with one of its offices being located at 70 Wall Street, in the City, State and Southern District of New York.

22. That at all times relevant hereto, "FORMER AMERICAN" was engaged in the business, among others, of lending money against collateral of securities registered on National Securities Exchanges.

23. That one BROAD & WALL CORPORATION (hereinafter called "B & W"), at all times relevant hereto, was a domestic corporation, organized and/or existing and doing business under and by virtue of the laws of the State of New York.

24. That at all times relevant hereto, "B & W" was engaged in the business of lending money and financing purchases of securities as a factor and/or financier, with offices at 101 Park Avenue, in the County, City and State of New York.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST
DEFENDANTS "TACHE," "SPEAR," "WILCOX," AND "GRABOWSKI."

25. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "24" of this complaint, as if more fully set forth herein.

26. That prior to January 2, 1963, plaintiff had pledged with "B & W" fifty (50) shares of Superior Oil of California stocks (hereinafter "SUPERIOR"), as collateral, against loans made to him by "B & W."

27. That thereafter, in and about February of 1963, "B & W" informed plaintiff that the aforesaid fifty (50) shares of "SUPERIOR" were sold by the brokerage firm of Thomson & McKinnon, on the open market of the New York Stock Exchange, in two lots, namely, 20 shares on January 2, 1963, at the price of \$1,155.00 per share and 30 shares on January 8, 1963, at the

price of \$1,130.00 per share.

28. That in and about November of 1968, plaintiff commenced an action for fraud in New York State Supreme Court, Kings County, entitled: Klein v. Spear, Leeds & Kellogg, et al., (hereafter the "STATE COURT ACTION"), and another action for fraud and Federal violations in the U.S.D.C. for the Southern District of New York, 68 Civil 5148, entitled: Klein v. Spear, Leeds & Kellogg, et al., (hereafter the "FEDERAL COURT ACTION"), and naming therein as defendant in the Second Causes of Action therein, the said broker, Thomson & McKinnon, together with the three (3) defendants, "Spear," "Kellogg," and "Grabowski," as co-defendants in that action.

29. That in the aforementioned "STATE COURT ACTION," plaintiff conducted an Examination Before Trial of the said Thomson & McKinnon, one of the defendants named in that action, and was informed, for the first time, by a partner testifying for said defendant, Thomson & McKinnon, (a) that the aforesaid fifty (50) shares of "SUPERIOR" were not sold and executed by said defendant, Thomson & McKinnon, but were sold and executed by Eache & Co., Inc., another brokerage firm, (one of the defendants named herein); (b) that on January 2, 1963, the said twenty (20) shares of "SUPERIOR" were not sold at the alleged price of \$1,135.00 per share, but were actually sold at \$1,055.00 per share; and (c) that the said thirty (30) shares of "SUPERIOR" were not sold on January 8, 1963, at the alleged price of \$1,130.00 per share, but were sold at \$1,100.00 per share.

30. That based on said testimony of said partner of Thomson & McKinnon, plaintiff, by letter dated June 2, 1970, requested the defendant "EACHE" to verify and disclose the name of the buyer of said transaction of January 8, 1963, relating to said thirty (30) shares "SUPERIOR" at \$1,100.00 per share.

31. That defendant "EACHE" refused to comply with plaintiff's request.

32. That plaintiff recently discovered as follows: On or before January 2, 1963, "B & W" employed the defendant "EACHE" to place and enter on the New York Stock Exchange, "Stop-Loss Orders" on the aforesaid fifty (50) shares of "SUPERIOR" as follows:

- (a) 10 shares at \$1,060.00 per share, stop-loss;
- (b) 10 shares at \$1,055.00 per share, stop-loss;
- (c) 10 shares at \$1,050.00 per share, stop-loss;

(d) 10 shares at \$1,045.00 per share, stop-loss; and

(e) 10 shares at \$1,040.00 per share, stop loss;

33. That defendant "EACHE" accepted the said Stop-Loss orders and, in turn, employed and entrusted the said specialist, defendant, "SPEAR," or "KELLOGG," or "GRABOWSKI" with the handling of said Stop-Loss orders ;

34. That defendant, "SPEAR," or "GRABOWSKI," or "KELLOGG," accepted said Stop-Loss orders, as "EACHE's" broker, and/or agent, for a consideration of receiving commissions for such services, if and when such Stop-Loss orders were executed ;

35. That at all times relevant thereto, and prior to January 2, 1943, "B & W" opened and maintained an account or accounts with defendant "EACHE" under the following name and description: "The Broad & Wall Corporation, 101 Park Avenue, New York 17, New York, Att.: Mr. Julius C. Berens, President"; and/or under other names ;

36. That, "B & W" on behalf of its customers and/or pledgors, employed the defendant "EACHE" as a stockbroker, agent and fiduciary, for the execution of sales orders and for placing so-called "Stop-Loss orders" on the New York Stock Exchange relating to the securities of its customers and/or pledgors ;

37. That defendant "EACHE" well knew, or had sufficient reason to know, that the security transactions in the account or accounts for "B & W" were in fact for securities owned by customers and/or pledgors of undisclosed principals of "B & W," who pledged their securities, as collateral, against loans obtained from "B & W." ;

38. That defendant "EACHE" knew, or had reason to know, that the so-called "Stop-Loss orders" and/or other orders placed by "B & W" with it, were for securities owned by customers and/or pledgors of undisclosed principals of "B & W," which securities were held by "B & W" as collateral, against loans made by "B & W" to such customers and/or pledgors ;

39. That defendant "EACHE" knew that "B & W" had extended loans to its customers on such securities pledged ;

40. That not only did "SPEAR" or "GRABOWSKI" or "KELLOGG" cause to touch off the first twenty (20) shares of "SUPERIOR" of said Stop-Loss orders, by his or their transactions for his or their own account, but he or

they, purchased the said twenty (20) shares, for him or their own account, at a lower manipulated and artificial price of \$1,055.00 per share, which was less than the prevailing market at that time between disinterested parties ;

41. That on the 2nd day of January, 1963, defendant, "SPER," or "KELLOGG," or "GRABOWSKI," instead of trying to protect the interests of plaintiff, the owner of the said fifty (50) shares of "SUPERIOR," in breach and violation of their fiduciary duties and responsibilities as specialists on the floor of the New York Stock Exchange, manipulated the price in "SUPERIOR" stock to the downside and created an artificial and fictitious lower price for "SUPERIOR," at \$1,055.00 per share, in order to allow him or them to pocket twenty (20) shares of the said fifty (50) shares, at much lower prices than the then prevailing market was in "SUPERIOR," at that time, on the New York Stock Exchange, for his or their own account and for his or their own benefit and interests, and to the damage of plaintiff .

42. That, in furtherance of such manipulation, as aforesaid, on the 2nd day of January, 1963, and prior to the execution of the trade of said twenty (20) shares of "SUPERIOR", defendant "SPER" or "KELLOGG," or "GRABOWSKI," executed artificial and fictitious transactions in "SUPERIOR" with himself or themselves, or with others, at fictitious lower prices, which prices were created and/or manipulated by himself or themselves, for the purpose to enable defendant "SPER," or "KELLOGG," or "GRABOWSKI," to obtain said twenty (20) shares of the said fifty (50) shares of "SUPERIOR" which were entrusted to him or them to be entered and registered in his or their books as Stop-Loss orders, for his or their own account, and at a fictitious price of \$1,055.00 per share, when in fact the prevailing market for "SUPERIOR" stock, at that time of the day, was considerably higher on the New York Stock Exchange ;

43. That on January 2, 1963, at the time when the first sales transaction on the New York Stock Exchange in "SUPERIOR" stock was executed, at \$1,055.00 per share, it was not made and executed between independent and disinterested third parties, but instead were manipulated, made and/or

arranged by and between defendant "SPEAR," or "KILLOGG," or "GRABOWSKI," or "BACHE," for the purpose of creating and placing in effect a fictitious price of \$1,055.00 per share, and fraudulently concealing from plaintiff and from "B & W" and from other persons, that "SPEAR," or "KILLOGG," or "GRABOWSKI," intended to acquire for himself or themselves the said twenty (20) shares, by putting in effect the aforementioned Stop-Loss orders for 10 shares at \$1,060.00 and for 10 shares at \$1,055.00 to be executed as market orders at \$1,055.00 per share, which price was lower than the true prevailing price of said stock on the New York Stock Exchange.

44. That it was the duty and obligation of defendant, "SPEAR," or "GRABOWSKI," or "KILLOGG," to maintain an orderly market in "SUPERIOR," to try to make every effort to protect the said fifty (50) shares of "SUPERIOR," or any part thereof, from being sold by reason of any other transaction in "SUPERIOR" stock for defendant, "SPEAR's," or "GRABOWSKI's," or "KILLOGG's," own account.

45. That it was the further duty and obligation of defendant "SPEAR," or "GRABOWSKI," or "KILLOGG," not to execute any transaction for his or their own account which would cause and result in putting into effect the said Stop-Loss orders or any part thereof, which were placed on behalf of plaintiff, as set forth hereinabove, and thereby causing the said Stop-Loss orders, or any part thereof, to become market orders.

46. That plaintiff never authorized anyone, nor consented to the acquiring of said twenty (20) shares of "SUPERIOR" by defendant "SPEAR," or "KILLOGG," or "GRABOWSKI," for his or their own account, and at a price lower than the prevailing market.

47. That neither "B & W" nor any other person acting on its behalf ever authorized anyone, nor consented to the acquiring of said twenty (20) shares of "SUPERIOR" by defendant, "SPEAR," or "KILLOGG," or "GRABOWSKI," for his or their own account, and at a price lower than the prevailing market.

48. That plaintiff, at the time he received the information that said twenty (20) shares of "SUPERIOR" were executed at \$1,055.00 per share, believed at that time that the execution of the said Stop-Loss orders was at the true prevailing market price and the sales were bona fide transactions in every respect.

49. Had the plaintiff known that the said Stop-Loss orders would not be handled by disinterested parties, with the utmost care and trust, and that the said Stop-Loss orders would be executed by defendant "SPFAR," or "KELLOGG," or "GRABOWSKI," or in concert with others, for the purpose of defrauding plaintiff, as aforesaid, he would not have entrusted anyone with said Stop-Loss orders.

50. By reason of the foregoing fraudulent acts of the aforesaid defendants, in violation of the "1933 Act" and "1934 Act," plaintiff repudiates said sales and requests compensatory damages in the sum of \$18,000.00.

51. In addition, as a result of the fraudulent and wrongful representations, manipulations and violations as aforesaid, plaintiff requests punitive damages under common State law fraud, in a sum to be assessed by the Court.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST
THE DEFENDANTS "BACHE," "SPFAR," "KELLOGG," and "GRABOWSKI"

52. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "51" of this complaint, as if more fully set forth herein.

53. That plaintiff recently discovered that on or before the 8th day of January 1963, "E & W" or some other person placed an order with defendant "BACHE," to sell plaintiff's thirty (30) shares of "SUPERIOR" on the New York Stock Exchange, at market price; that on said day of January 8, 1963, defendant "BACHE" received and accepted from "E & W" or from some other person an order to sell said thirty (30) shares of "SUPERIOR" on the New York Stock Exchange, at market price, and defendant "BACHE," in turn, entrusted and transferred said order to its agent, defendant, "SPFAR," or "KELLOGG," or "GRABOWSKI," for a consideration of receiving commissions for such services; that defendant "SPFAR," or "KELLOGG," or "GRABOWSKI," on said day of January 8, 1963, instead of trying to protect the interests of plaintiff, the owner of the said thirty (30) shares of "SUPERIOR," and in breach and in violation of their fiduciary duties and responsibilities to the general public and to plaintiff, manipulated the price of "SUPERIOR" stock to the downside, and created a fictitious lower price for "SUPERIOR," in order to enable him or them to pocket these thirty (30) shares for his or their own account, and for his or their own benefit and interests, at such lower prices than the then prevailing market was for "SUPERIOR" on the

New York Stock Exchange, by reason of which the plaintiff was defrauded and damaged as hereinafter set forth; that on January 8, 1963, at the time when the first sales transaction on "SUPERIOR" on the New York Stock Exchange was made and executed at \$1,100.00 per share, it was not made and executed by and between disinterested third parties, but was instead made, executed, and/or arranged by and between defendant "SPEAR," or "KELLOGG," or "GRABOWSKI," or "EACHE," or others, on behalf of defendant, "SPEAR," or "KELLOGG," or "GRABOWSKI," or "EACHE," or its employees or associates, for the purpose of effectuating the fraudulent intentions of the specialist, "SPEAR," or "KELLOGG," or "GRABOWSKI," to defraud plaintiff, and to take for himself or themselves the said thirty (30) shares of "SUPERIOR" at \$1,100.00 per share, which was a fictitious manipulated low price, and was not the then prevailing market price on the New York Stock Exchange for "SUPERIOR" stock; that defendant "EACHE" conspired with "SPEAR," or "KELLOGG," or "GRABOWSKI," or others, to circumvent the discovery of the aforementioned fraudulent and wrongful acts.

54. Had the plaintiff known that the said sales order would not be executed by disinterested parties, with the utmost care and fiduciary duties, as required by law and rules and regulations, and that the orders would be executed by defendant, "SPEAR," or "KELLOGG," or "GRABOWSKI," or in concert with defendant "EACHE," as set forth hereinabove, he would never have entrusted anyone to place said order, and would have made every effort to stop the execution of such sales transaction.

55. By reason of the foregoing fraudulent and manipulative acts of the aforesaid defendants in violation of the "1933 Act" and "1934 Act", plaintiff repudiates said sales and requests compensatory damages in the sum of \$27,000.00.

56. In addition, as a result of the fraudulent and wrongful representations, manipulations and violations as aforesaid, plaintiff requests punitive damages under common State law fraud, in a sum to be assessed by the Court.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST
THE DEFENDANTS "BACOR AND "AMERICAN BANK"

57. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs "1" through "56" inclusive, as if more fully set forth herein at length.

58. That prior to January 8, 1963, "B & W" offered to lend to plaintiff sums of moneys for purchasing and/or for carrying his securities registered on the New York Stock Exchange.

59. That prior to January 8, 1963, "B & W" maintained one or more checking accounts, and/or one or more loan accounts, and/or one or more clearance accounts and/or one more other accounts at "FORMER AMERICAN."

60. That prior to January 8, 1963, the plaintiff and "B & W" entered into agreements which provided, among other things, that:

(a) "B & W" will lend and advance to plaintiff various sums of moneys as collateral loans against plaintiff's securities pledged by plaintiff; and

(b) That the proceeds of said plaintiff's loans were to be paid by "B & W" against delivery of plaintiff's securities to "FORMER AMERICAN" for the account of "B & W," to be kept by "B & W" in a fiduciary account for plaintiff; and

(c) That at all times the pledged securities would be available to plaintiff, on payment of the loan indebtedness, with interest.

61. The plaintiff entered into the aforesaid agreements with "B & W" relying on the representations of "FORMER AMERICAN," and "B & W" that:

(a) "B & W" had millions of dollars of its own funds available to finance said collateral loans;

(b) That all the securities pledged would be physically maintained by "B & W" at "FORMER AMERICAN";

(c) That all the securities pledged would be available to plaintiff at all times, to be returned to him, or to his designee, in full or in part, upon demand, whenever the indebtedness would be paid off with interest due thereon.

62. Pursuant to the representations as aforesaid, plaintiff, in and about December, 1962, delivered to "FORMER AMERICAN" said fifty (50) shares of "SUPERIOR," to be held for his account with "B & W."

63. That plaintiff recently discovered the said representations of "B & W" and "FORMER AMERICAN" to be false, in that "B & W" at all times relevant hereto,

(a) did not have millions of dollars of its own funds available to make such loans;

(b) that the securities pledged by plaintiff to "B & W" were not kept in the custody and control of "B & W" for safekeeping and availability to plaintiff, upon demand and upon payment of the outstanding loans to "B & W," but that plaintiff's securities were in fact pre-pledged and/or rehypothecated and/or intermingled with other loans in the name of "B & W" and/or in the name of its nominee and/or in the name of other persons, at "FORMER AMERICAN " ;

(c) that "B & W" and/or other persons acting on behalf of "B & W" represented to "FORMER AMERICAN" that "B & W" and/or another person was the owner of the said fifty (50) shares of "SUPERIOR," and "FORMER AMERICAN" knew that such representations were untrue and false;

(d) that "FORMER AMERICAN" paid to the deliverors of the plaintiff's securities from the proceeds of the illegal and wrongful loans made by "FORMER AMERICAN," to said "B & W" or to other persons, or by employing the facilities of "FORMER AMERICAN's" clearance department;

(e) that thereafter "FORMER AMERICAN" redelivered such securities to the recipient broker, defendant "EACHE," for the account of "B & W" and/or others, and was reimbursed by receiving the moneys from the proceeds of sale by said broker, defendant, "EACHE," all with the knowledge, and instructions of "B & W," or other persons, without disclosing to plaintiff such illegal loans, clearances and manipulations, as hereinabove set forth.

64. That "FORMER AMERICAN" knew that said fifty (50) shares of "SUPERIOR" were owned by plaintiff and were pledged by him with "B & W" and were delivered to "FORMER AMERICAN" for plaintiff's account.

65. That "B & W" in concert with "FORMER AMERICAN" illegally and wrongfully deposited and/or prepledged and/or rehypothecated, and/or disposed of the aforesaid fifty (50) shares of "SUPERIOR" stock through the defendant "AMERICAN BANK'S" predecessor "FORMER AMERICAN" and defendant "EACHE."

66. That the aforesaid illegal and wrongful deposit and/or prepledge and/or rehypothecation, and/or disposal of plaintiff's securities, was made by "B & W" in conspiracy with defendant "EACHE," and "FORMER AMERICAN," to deprive plaintiff of his said 50 shares of "SUPERIOR."

67. That "FORMER AMERICAN" was used by "B & W" as a conduit through which to funnel the securities of the plaintiff, as hereinabove set forth, to the illegal and wrongful uses and benefits of "B & W," "FORMER AMERICAN" and defendant "EACHE," with the full knowledge by defendant "EACHE" and "FORMER AMERICAN" of such illegal and wrongful acts.

68. That defendant "EACHE" and "FORMER AMERICAN," at all times relevant hereto, knew, or should have known, that the said securities were not owned by "B & W," and that they were owned by plaintiff, and that they had been pledged by plaintiff with "B & W."

69. That prior to January 8, 1963, and at all times relevant hereto, "B & W" maintained in its own name, BROAD AND WALL CORPORATION, or in other names, accounts with "FORMER AMERICAN."

70. That by their receipt and transfer of the said fifty (50) shares of "SUPERIOR" as hereinabove set forth, and by their conversion for the account of "B & W," or other persons, and by their transmittal of said securities to defendant "EACHE" and/or to other brokers, defendants "EACHE" and "FORMER AMERICAN" knowingly participated in the fraud upon the plaintiff herein.

71. That defendants "EACHE" and "FORMER AMERICAN" knew and/or should have known that the said securities were not owned by "B & W."

72. That "FORMER AMERICAN" fraudulently intermingled said fifty (50) shares of "SUPERIOR," and made loans to "B & W" in violation of Regulation

"U" under the "1934 Act" and in excess of the loan value of said 50 shares of "SUPERIOR" and fraudulently liquidated or caused to liquidate the said 50 shares of "SUPERIOR" in plaintiff's account with "B & W."

73. That the signature card of "B & W," the monthly statement of account, the correspondence and memoranda of all transactions between "B & W" and "FORMER AMERICAN" for the period prior to January 8, 1953, as well as all other memoranda and documents relating to "B & W's" account at "FORMER AMERICAN" are in possession and control of the defendant "AMERICAN BANK," or in the possession and control of its attorneys.

74. Had the plaintiff known that the aforementioned representations by "B & W" and "FORMER AMERICAN" were false, and of the subsequent unlawful and fraudulent manipulations of defendants "BACHE," and "AMERICAN," plaintiff would never have pledged his securities with "B & W," and would never have delivered his securities to "FORMER AMERICAN."

75. That, at all times relevant hereto, regulation U and regulation T issued by the Board of Governors of the Federal Reserve System pursuant to the "1934 Act," prohibited the extension or maintenance of credit for the purpose of purchasing or carrying any security registered on a National Securities Exchange, in excess of thirty (30%) per cent of the then current market value.

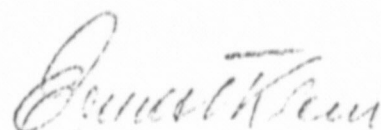
76. That by reason of the foregoing, the plaintiff requests judgment against the defendants "AMERICAN BANK," and "BACHE," to rescind and/or to annul the loan agreements between "B & W" and "FORMER AMERICAN," and to rescind and/or annul the sales of the said fifty (50) shares of "SUPERIOR," by defendant "BACHE," as alleged hereinabove, and to direct said defendants "AMERICAN BANK" and "BACHE" to restore plaintiff's securities and to deliver them to plaintiff, or to his designee against payment of the amounts that were paid by "FORMER AMERICAN" to the deliverors of plaintiff's securities to "FORMER AMERICAN" on the date of such deliveries, or, to compensate the plaintiff for the difference between the highest market value which the said securities will have attained from the time prior to the delivery of said fifty (50) shares of "SUPERIOR" to "FORMER AMERICAN," to the time of trial of this action.

77. That by reason of all of the aforesaid violations of the "1933 Act" and "1934 Act" by defendants "LACHÉ" and "FORMER AMERICAN," as hereinabove set out, and as part of the plan, scheme, device and conspiracy to defraud plaintiff, the plaintiff has been damaged in the sum of FORTY-FIVE THOUSAND (\$45,000.00) DOLLARS,

78. That by reason of the acts on the part of defendant "LACHÉ" and "FORMER AMERICAN," the plaintiff requests an award of punitive damages under common State Law fraud, against defendants "AMERICAN BANK," and "LACHÉ," in an amount as the Court may assess.

WHEREFORE, plaintiff demands judgment (a) against the defendants named in the First Cause of Action, in the sum of EIGHTEEN THOUSAND (\$18,000.00) DOLLARS, (b) against the defendants named in the Second Cause of Action in the sum of TWENTY SEVEN THOUSAND (\$27,000.00) DOLLARS, and/or judgment against the defendants named in the Third Cause of Action, in the sum of FORTY-FIVE THOUSAND (\$45,000.00) DOLLARS, and judgment for punitive damages in such amounts as the Court may assess in the First, Second and Third causes of action, together with the interests, costs and disbursements of this action.

Dated: Brooklyn, New York
January 4, 1971.



ERNEST KLEIN
Plaintiff, Pro Se
5517 - 15th Avenue
Brooklyn, N. Y. 11219
Tel. @ UL 1 - 5390

EXHIBIT G

JAN 15 1972

REC

D/S Section

165-21 Files
Pleading
with Fed
Action

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Office of the Clerk
United States Court House,
Foley Square,
New York, N. Y. 10007

JOHN LIVINGSTON,
Clerk

Date Jan. 14, 1972

Mr. Ernest Klein
5517 15th Ave.
Brooklyn, N.Y.

Title: ERNEST KLEIN -v- BACHE & CO., Inc. et al

Docket Number: Pro Se 71 Civ. 20 & 71 Civ. 63

Decision dated: Jan. 13, 1972

Judge McLEAN

S i r :

There is enclosed herewith, copy of decision
filed and entered in the above-entitled proceeding.

c.c.

Baar, Bennett & Fullen, Esqs.
One Battery Park Plaza
N.Y.C. 10004

Reavis & McGrath, Esqs.
One Chase Manhattan Plaza
N.Y.C. 10005

Very truly yours,

JOHN LIVINGSTON,
Clerk

By: Reba Hughes

Asst. Deputy Pro Se Clerk.
Donovan, Leisure, Newton & Irvine, Esqs
Two Wall Street
N.Y.C. 10005

DOCKETED

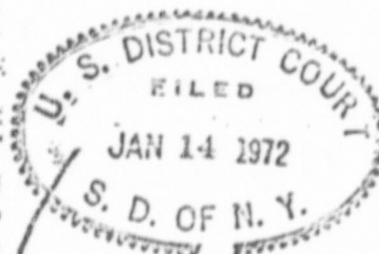
Ernest Klein v. Bache & Co., Inc.,
et al., 71 Civ. 20, No. 122 on
Civ. Mot. Cal. September 14, 1971

This motion is granted on the authority
of Klein v. Walston & Co., Inc., 432 F.2d 936
(2d Cir. 1970). All proceedings in this action are
stayed pending the final determination of an action
pending in the Supreme Court, Kings County, entitled
Klein v. Bache & Co., Inc., et al., Index No. 200042/70.

So ordered.

Dated: January 13, 1972

Edward R. Fain
U. S. D. J.



DOCKETED

Ernest Klein v. Bache & Co., Inc., et al.
71 Civ. 20, Civ. Mot. Cal. September 14, 1971
No. 123

By order dated January 13, 1972, on motion no. 122 on the calendar of September 14, 1971, the court has stayed all proceedings in this action pending the final determination of an action pending in the Supreme Court, Kings County. The time of defendant Bache & Co., Inc. to answer the complaint herein is extended until twenty days after the expiration of the stay.

So ordered.

Dated: January 13, 1972

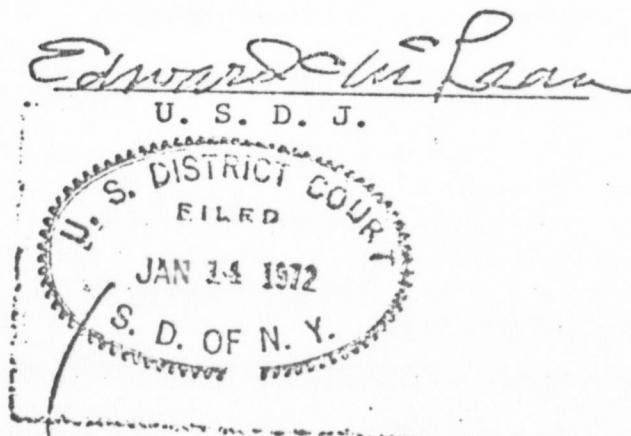


EXHIBIT H

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ^{twentieth} day of ^{October} one thousand nine hundred and ^{seventy-two}.

Present: HON. HENRY J. FRIENDLY
Chief Judge
HON. HAROLD R. MEDINA
HON. ROBERT P. ANDERSON

Circuit Judges,

Ernest Klein,

Plaintiff-Appellant,

v.

Bache & Co., Inc., and Spear, Leeds &
Kellogg, James Crane Kellogg III and
Raymond E. Grabowski,

Defendants-Appellees.

Appeal from the United States District Court for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court ~~extending the time of defendant~~ staying all proceedings in this action pending the final determination of an action in the Supreme Court, Kings County, New York, entitled Klein v. Bache & Co., Inc., et al., be and it hereby is affirmed. Klein v. Walston & Co., Inc., 432 F.2d 936 (2d Cir. 1970).

It is now hereby further ordered that the appeal of the order of said District Court extending the time of defendant Bache & Co. to answer the complaint be and it hereby is dismissed for lack of jurisdiction.

Henry J. Friendly

Harold R. Medina

Robert P. Anderson

Circuit Judges

DOCKETED

At a Special Term, Part I of
the Supreme Court of the State of New
York held in and for the County of
Kings at the Courtroom in Brooklyn,
New York on the 2 day of March,
1971.

*Falsely
Pleading, in
Burglary Case.*

P R E S E N T

HON. JOHN E. CONE,

J u s t i c e.

-----X
ERNEST KLEIN,

Plaintiff,

: Index No. 20042/70

- against -

BACHE & CO., INC., SPEAR, LEEDS &
KELLOGG, JAMES CRANE KELLOGG III,
RAYMOND E. GRABOWSKI and AMERICAN
BANK & TRUST CO.,Defendants.
-----XO R D E R

The defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski having moved this Court for a judgment pursuant to Rule 3211 CPLR dismissing the complaint in this action as to them upon the grounds that the action was time-barred on the date of its commencement by all applicable statutes of limitations; that the plaintiff was barred from maintaining this action by a final order and a final judgment of this Court entered in Ernest Klein v. Spear, Leeds & Kellogg, et al. (Index No. 3283/69); and that the action was vexatious, was repetitious, was commenced in bad faith for

an ulterior purpose, and constituted an abuse of the process of this Court; and the plaintiff having cross-moved for various relief including an order requiring all defendants to appear for examination before trial by the plaintiff prior to the hearing and determination of these motions; and said motion and cross-motion having come on to be heard by this Court, and due deliberation having been given to them, and this Court having rendered a decision dated February 5, 1971 granting the motion of the moving defendants for a dismissal of the complaint in this action as to them upon the ground that a final judgment obtained by the moving defendants against the plaintiff in this Court in Ernest Klein v. Spear, Leeds & Kellogg (Index No. 3283/69) was res adjudicata and barred the plaintiff from maintaining this action against the moving defendants;

Now, upon reading and filing the Notice of Motion of the defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski dated October 28, 1970, the affidavit of Denis B. Sullivan sworn to on October 28, 1970 and exhibits A, B, C and D attached thereto, and the reply affidavit of Denis B. Sullivan sworn to on December 18, 1970, and the sur-reply affidavit of Denis B. Sullivan sworn to on December 29, 1970, all submitted in support of said motion and in opposition.

to the plaintiff's cross-motion, and the Notice of Cross-Motion of the plaintiff dated December 8, 1970, and the affidavit of the plaintiff sworn to on December 8, 1970, ^{filed number body # 20040-1970} and the supplemental affidavit of the plaintiff sworn to on December 21, 1970 and exhibits 1 and 2 attached thereto, and the further affidavit of the plaintiff sworn to on December 29, 1970, ^{filed number # 20040-1970} all submitted in support of the plaintiff's cross-motion, and in opposition to the defendants' motion, all with proof of service, and upon filing the memorandum decision of this Court dated February 5, 1971, it is on motion of Reavis & McGrath, attorneys for the defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski;

ORDERED, that the motion of said defendants for a judgment dismissing this action as to them be and the same hereby is granted with \$20 motion costs, ^{and the action sworn to accordingly} and it is further

ORDERED, that the cross-motion of the plaintiff be and the same is denied in all respects as to said defendants; and it is further

ORDERED, that the Clerk of this Court shall enter a judgment against the plaintiff and in favor of the defendants, Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E.

Grabowski dismissing the complaint in this action as to said defendants with \$20 motion costs plus such taxable disbursements as may be taxed by the Clerk of this Court.

ENTER

Y E C

Granted
Mar 2 1971
Anthony N. Duro
Clerk

FORM 91

102

MEMORANDUM

SUPREME COURT

KINGS

COUNTY

(SPECIAL TERM PART I)

KLEIN

vs.

BACHE & CO., et al.

By C O N E, J.

Dated February 5, 1971

Filed 115-17
Pleadings
King location

Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski, three of the defendants in the above entitled action, move for judgment pursuant to CPLR 3211 on the ground that the complaint fails to state a cause of action, being time-barred by the statute of limitations, a second ground that res judicata bars maintenance of the action and a third ground that the court has inherent powers to dismiss because the suit is vexatious and a malicious misuse of process.

Having reviewed the complaints in this and a prior action (Index No. 3283/69) between these same parties and finding the issues substantially the same in both, it follows that the judgment dated April 30, 1970 of dismissal "with prejudice" of the earlier action, is a bar by way of the doctrine of res judicata to the maintenance of this action against the moving defendants. All that is required is that both causes have a measure of identity (Polayko v. Nieberg, 290 N.Y. 304; Hull v. Hull, 225 N.Y. 342; Israel v. Wood Dolson, 1 N.Y.2d 116). This is precisely the situation here. Plaintiff has endeavored to avoid the implication of the earlier judgment by dropping a defendant and slightly varying some of the causes of the complaint in insignificant detail. In essence, the causes of action are based on the same transactions and the issues remain the same.

If it were to be argued that the judgment of dismissal in the former suit was not on the merits, attention is directed to CPLR 5013 which provides, in part:

"A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits, unless it specifies otherwise * * *."


The judgment of April 30, 1970, referred to above, specifies:

"ADJUDGED that this action be and it hereby is dismissed, with prejudice, as to the defendants Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski, and it is further,"

which, not having been corrected, changed, amended, set aside or reversed, remains conclusive against the plaintiff.

The other grounds for the motion are not reached as being academic. Accordingly, the motion for judgment in favor of the moving defendants is granted with \$20 motion costs.

Settle order.



J.S.C.

SUPREME COURT

MEMORANDUM

COUNTY

KINGS

(SPECIAL TERM PART I),
By

ERNEST KLEIN

CONE,

Dated

June 1,

19
73

vs.

BACHE & CO., INC., et al

Some two years after the entry of an order of this court based on a decision dated February 5, 1971 as well as its reargument decided May 4, 1971, the plaintiff moves for renewal, reargument and reconsideration.

The decisions (in dismissing the complaint) determined that a judgment of this court, dated April 30, 1970, was res judicata with respect to the plaintiff's cause of action as against the defendants Spear Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski.

Now, also, two years later, the plaintiff states that an order of the Appellate Division, dated May 25, 1971, reversed the judgment of April 30, 1970, and that consequently the doctrine of res judicata is now shown to have been an improper basis for the decisions of February 5th and May 4th, 1971, entitling plaintiff to the reconsideration requested, and, if granted, to a consequent order permitting him to serve a further amended complaint to include the defendants (supra).

Other factors, however, have taken place since that time. The defendants allege that they never received notice of appeal, as demonstrated by excerpts from their attorneys' office records, despite the allegation of the plaintiff that he

"timely served on April 6, 1971 a notice of appeal dated April 6, 1971 from said order of March 2, 1971, and which notice of appeal, together with an affidavit of service thereof, is part of the file in this action in the office of the County Clerk of Kings County, which appeal is still pending."
(emphasis supplied)

Examination of the County Clerk's office records by defendants disclosed the filing of a notice of appeal with an affidavit of service, but on November 4, 1971, seven months after the date of the alleged service. Moreover, no proceedings of any kind were taken by the plaintiff with respect to the appeal and to all intents and purposes and despite the plaintiff's claim that the appeal is pending, it is evident that no prosecution thereof has been made. It therefore may not be said that such an appeal is pending, particularly in view of the denial of receipt of a copy and the lapse of seven months in filing thereof with the clerk of this court. Such an appeal presently attempted to be prosecuted would undoubtedly be rejected.

The court believes that the plaintiff was well aware of this situation and chose instead to return to this court for reargument and renewal as an expedient to avoid the implications of his failure to prosecute the appeal if, in fact, it is pending as he claims.

In any event CPLR 5515, as interpreted by Weinstein-Korn-Miller at section 5515.06, states that an appeal is taken by serving the notice and filing it with the clerk, both being necessary to take the appeal, which must be done within the time limited to take the appeal. If, through mistake or excusable neglect, only one is done, an extension of time to do the other may be obtained in a proper case. Thus, if validity is accorded to the service (which is denied) within the time prescribed, the other necessary element of filing "within the time limited therefor" is not present, it having taken some seven months to accomplish. This lends credence to the belief that the alleged notice with proof of service and its filing were afterthoughts of one kind or another.

Leave to reargue is not granted.

Insofar as this court is concerned, the action is no longer pending, having been terminated by dismissal. While it is true that the filing of a notice of appeal in the ordinary situation does not inhibit reargument, the court feels that the plaintiff is playing fast and loose by attempting to avoid the implications of the failure to prosecute the appeal.

On the other hand, if reargument were to be granted and the court were to reconsider, the opportunity must be afforded to the defendants to renew their original motions, made on grounds other than res judicata which rendered them academic. Upon review of the earlier papers at this time, it comes to light that the statute of limitations also urged at that time, had run against the plaintiff's action, it having been commenced on August 28, 1970, on a cause of action accruing on January 2, 1963, some seven years, seven months and twenty-six days before (see complaint).

Considering all of the factors involved and the additional fact that the plaintiff had instituted an action in the Federal Court based on the same facts, presently suspended until a final declaration in this court of this action, I now hold that this action is ended. This will enable the plaintiff to apply to the U.S. District Court to set aside the suspension so that he may prosecute it there, if that court is favorably disposed to such application.

The motion is denied in its entirety.

Submit order.

J.S.C.

DEFENDANTS-APPELLEES' RULE 9 (g) STATEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X
	:
ERNEST KLEIN,	68 Civil 5148 M.I.G.
	:
Plaintiff,	:
	:
- against -	: <u>RULE 9(g) STATEMENT</u>
	:
SPEAR LEEDS & KELLOGG, JAMES CRANE	:
KELLOGG, III, RAYMOND E. GRABOWSKI,	:
MABON NUGENT & CO., WEINGARTEN &	:
CO., HERMAN LASS, LEW SONN, SIDNEY	:
S. BOBBE, VANDEN BROECK LIEBER &	:
CO., THOMSON & McKINNON, REYNOLDS &	:
CO., and HERMAN FINS,	:
	:
Defendants	:
-----	X

In connection with that part of the motion of Spear Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski (the Kellogg defendants) brought on by Notice of Motion dated May 10, 1974, which seeks summary judgment pursuant to Rule 56, FRCP, dismissing as to them the claims asserted in the First Cause of Action of the amended complaint, the moving parties contend that no genuine issue of fact remains to be tried with respect thereto for its reasons set forth in the decision of Judge Motley dated August 22, 1972 attached to the motion papers as Exhibit C, the order of Judge Motley entered on that decision attached to the motion papers as Exhibit D, and the judgment of the Court of Appeals, Second Circuit, entered in this Court on April 25, 1973 affirming the aforesaid order of Judge Motley.

Yours, etc.

REAVIS & McGRATH

By Denis B. Sullivan
Denis B. Sullivan

Attorneys for the defendants,
Spear Leeds & Kellogg, James Crane
Kellogg III and Raymond E.
Grabowski
1 Chase Manhattan Plaza
New York, New York 10005
(269-7600)

TO:

Gainsburg, Gottlieb, Levitan & Cole
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017

Satterlee, Warfield & Stephens
Attorneys for Defendant Vanden Broeck, Lieber & Co.
277 Park Avenue
New York, New York 10017

Hall, McNicoll, Marétt & Hamilton
Attorneys for Defendant Thomson & McKinnon, Inc.
41 East 42nd Street
New York, New York 10017

REPLY AFFIDAVIT ON BEHALF OF
DEFENDANTS-APPELLEES

-96-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

ERNEST KLEIN, :

Plaintiff, :

- against - :

68 Civ. 5148 M.I.C.

SPEAR, LEEDS & KELLOGG, JAMES CRANE :

KELLOGG III, RAYMOND E. GRABOWSKI, :

MADON NUGENT & CO., WEINGARTEN & CO., :

HERMAN LASS, LEW SONN, SIDNEY S. :

BOBBE, VANDEN BROECK LIEBER & CO., :

THOMSON & McKINNON, REYNOLDS & CO., :

and HERMAN FINS, :

Defendants. :

- - - - - x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

DENIS B. SULLIVAN, being duly sworn, deposes and says:

1. I am a member of the firm of Reavis & McGrath, attorneys for the defendants Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski (the Kellogg defendants). I submit this affidavit in reply to the opposing affidavit of the plaintiff sworn to on June 17, 1974, and in further support of the motion made on behalf of the Kellogg defendants brought on by Notice of Motion dated May 10, 1974.

2. While the plaintiff sets forth many alleged facts concerning the challenged purchase transaction, all of which were presented to Judge Motley (see prolix amended complaint commencing at Paragraph 26), he studiously avoids coming to grips

with the issue presented in that part of our motion that is predicated on the decision of Judge Motley dated August 22, 1972, the order entered on that decision, and the judgment of the Court of Appeals, Second Circuit, affirming that order, pursuant to which Judge Motley granted, and the Court of Appeals affirmed, summary judgment dismissing the claims asserted in the First Cause of Action of the amended complaint as to the defendants Weingarten & Co. and Mabon, Nugent & Co. (the Weingarten & Co. defendants).

3. We contend on the basis of that decision and order, as affirmed, that the Kellogg defendants are now entitled as a matter of law to summary judgment dismissing the claims asserted in the same First Cause of Action as to them as well for all the reasons set forth in our motion papers, in our Rule 9(g) statement, and in our Memorandum of Law.

4. The plaintiff does not deny, nor can he deny, that claims asserted against the Kellogg defendants in that First Cause of Action are identical to claims asserted therein against the Weingarten & Co. defendants, namely, that the latter defendants, acting through the Kellogg defendants, acquired for the plaintiff's account 10 shares of stock of Superior Oil Co. at an alleged inflated price of \$1,640 per share arrived at, it is claimed, by fraudulently manipulating the prices at which Superior Oil stock was selling on the New York Stock Exchange on the date the trade was made.

5. Thus, the issues presented by the claims asserted in the First Cause of Action are twofold. First, did the plaintiff pay the alleged inflated price of \$1,040 per share for the 10 shares; and, second, has the plaintiff been able since this action was commenced on December 28, 1968 to produce any proof whatsoever sufficient to warrant a trial that the price of \$1,040 per share was a manipulated price as he claims it was. Both of those issues were presented to Judge Motley and were resolved against the plaintiff in a decision and order that was affirmed by the Court of Appeals.

6. Moreover, in the identically entitled counterpart to this action commenced by the plaintiff in the Supreme Court, Kings County, that court granted summary judgment dismissing on the grounds of res adjudicata and collateral estoppel as to the Kellogg defendants, the identical First Cause of Action asserted in that court, in a decision and order from which an appeal was noticed, but was never perfected and apparently was abandoned.

7. The attempt now being made on behalf of the plaintiff to raise issues of fact concerning the activities of the Kellogg defendants with respect to the challenged trade are ridiculous. That attempt is obviously intended to create the impression that there are issues of fact remaining to be tried as to the Kellogg defendants that were not presented to and decided by Judge Motley. The complete answer lies in the fact that Judge Motley cut through all the chaff contained in the prolix amended

complaint with respect to the claims asserted in the First Cause of Action, and came to grips with the two issues the plaintiff had to prove in order to succeed in obtaining a judgment against any defendant sued in the First Cause of Action, namely, did the plaintiff pay an alleged inflated price for the shares, and if so, was that price a manipulated price in excess of the true value of the shares. Both were decided against the plaintiff in a decision and order that was affirmed by the Court of Appeals. Thus, it is now a matter of complete indifference whether the Kellogg defendants did or did not violate any Stock Exchange rules, or did or did not act in concert with the defendant Vanden Broeck Lieber & Co. in undertaking to sell 20 shares of Superior Oil stock which were never sold to, never delivered, and never purchased and paid for by the plaintiff.

8. For the foregoing reasons, for all the reasons set forth in our motion papers, in our Rule 9(g) statement, and in our Memorandum of Law, we again urge most respectfully that the Kellogg defendants are now entitled as a matter of law to summary judgment dismissing as to them the claims asserted in the First Cause of Action of the amended complaint in that the decision and order of Judge Motley as affirmed by the Court of Appeals is res adjudicata, as is the decision and order of the Supreme Court, Kings County, that dismissed as to the Kellogg defendants the identical First Cause of Action contained in the complaint in the identically entitled counterpart action commenced in that court.

9. Concerning that part of our motion that seeks an order dismissing as to the Kellogg defendants the claims asserted in the Second Cause of Action of the amended complaint, we find that once again the plaintiff avoids coming to grips with the issues presented in that part of our motion.

10. That part of our motion is predicated on two facts: (1) that the plaintiff has utterly failed to proceed with his prosecution of the Second Cause of Action since he commenced this action on December 28, 1968, more than five and one-half years ago; and (2) that the plaintiff commenced a later action in this Court entitled Klein v. Bache & Co., et al., 71 Civil 20, in which exactly the same claims of wrongdoing are asserted against the Kellogg defendants as are asserted against them in the Second Cause of Action contained in the instant amended complaint.

11. Nowhere in his opposing affidavit does the plaintiff take issue with our contention that he has been guilty of gross and inexcusable neglect in proceeding with his prosecution of the Second Cause of Action since this action was commenced on December 28, 1968. On the other hand he admits in Paragraph 18 of his affidavit that the later Klein v. Bache & Co. action "does involve the same basic facts."

12: Thus, it stands established (a) that the plaintiff has long been in violation of the applicable provision of Rule 41, FRCP, which requires every action commenced in a Federal

Court to be prosecuted with due diligence under penalty of having it dismissed for lack of prosecution for failure to do so; and (b) that the exact same claims of wrongdoing on the part of the Kellogg defendants asserted in the Second Cause of Action are also asserted a second time in the later Klein v. Bache & Co. action.

13. The suggestion made in the opposing affidavit in an effort to avoid a dismissal for lack of prosecution of the claims asserted against the Kellogg defendants in the Second Cause of Action, that this action and the Klein v. Bache & Co. action should be consolidated for trial purposes with what the plaintiff refers to as the "specialist cases" is utterly ludicrous. It is based on a pre trial order that was obtained in other actions that did not include this action or the Klein v. Bache & Co. action. And it was obtained following a pre-trial conference conducted in those other actions, but not in this action or in the Bache & Co. action.

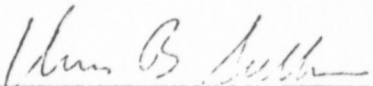
14. Thus, the attorneys for the other defendants in this action and in the Bache & Co. action were never presented with an opportunity to voice their opposition, if any they might have, to a consolidation of the trials of this action and of the Bache & Co. action with the trials of the other so-called "specialist cases."

15. What the plaintiff is in effect asking this Court to do is to ignore his conceded lengthy procrastination in

proceeding with the prosecution of the claims asserted in the Second Cause of Action since the commencement of this action on December 28, 1968, more than five and one-half years ago, and instead to grant relief without any motion for that relief ever having been applied for, and without an opportunity ever having been afforded to other attorneys to oppose the granting of that relief.

16. The fact remains that it stands established that the plaintiff has been guilty of gross and inexcusable neglect in proceeding with his prosecution of the claims contained in the Second Cause of Action since December 28, 1968, the date this action was commenced. The fact also remains as admitted by the plaintiff that exactly the same claims of wrongdoing on the part of the Kellogg defendants asserted in instant Second Cause of Action, are also asserted a second time in the later Klein v. Bache & Co. action.

17. For the foregoing reasons, and for all the reasons set forth in our motion papers, we again respectfully urge that the claims asserted in the Second Cause of Action be dismissed for lack of prosecution, and that the plaintiff be required to seek any relief he may be entitled to against the Kellogg defendants in the Klein v. Bache & Co. action.



Denis B. Sullivan

Sworn to before me this
25th day of June, 1974.

CAMILLE E. GRANATO
Notary Public, State of New York
No. 31-1532370
Qualified in New York County
Commission Expires March 30, 1975

SUPPLEMENTAL RULE 9 (g) STATEMENT ON BEHALF
OF DEFENDANTS-APPELLEES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	
ERNEST KLEIN,	:
	:
Plaintiff,	:
	:
-against-	:
	:
SPEAR LEEDS & KELLOGG, JAMES CRANE	:
KELLOGG III, RAYMOND E. GRABOWSKI,	:
MABON NUGENT & CO., WEINGARTEN & CO.,	:
HERMAN LASS, LEW SONN, SIDNEY S.	:
BOBBE, VANDEN BROECK LIEBER & CO.,	:
THOMSON & MCKINNON, REYNOLDS & CO.,	:
and HERMAN FINS,	:
	:
Defendants.	:
-----x	

68 Civil 5148 M.I.G.

SUPPLEMENTAL RULE
9(g) STATEMENT

This Supplemental Rule 9(g) Statement is submitted on behalf of the defendants, Spear Leeds & Kellogg, James Crane Kellogg III, and Raymond E. Grabowski (the Kellogg defendants), in further support of that part of their motion herein which seeks summary judgment pursuant to Rule 56, FRCP, dismissing as to those defendants, the claims asserted against them in the First Cause of Action of the amended complaint.

The moving defendants contend that in light of the decision of Judge Motley of this Court dated August 22, 1972, the order of Judge Motley entered on that decision, and the judgment of the Court of Appeals, Second Circuit, entered in this Court on April 25, 1973, affirming the judgment of Judge Motley, no genuine issue of fact remains to be tried in this action concerning the following:

(a) That the purchase transaction between the plaintiff and the defendants, Weingarten & Co. and Mabon Nugent & Co., concerning 20 shares of Superior Oil Co. stock complained of in the First Cause of Action, was never consummated.

(b) That the plaintiff never paid any price for those 20 shares of Superior Oil Co. stock either to the defendant Weingarten & Co., or to the defendant, Mabon Nugent & Co., or to the Kellogg defendants.

(c) That when the purchase price for the aforesaid 20 shares of Superior Oil Co. stock was not forthcoming from the plaintiff, the defendant Weingarten & Co., sold the 20 shares for the plaintiff's account at a net loss of \$151.97.

(d) That following that sale by the defendant, Weingarten & Co., of the 20 shares of Superior Oil Co. stock for the account of the plaintiff, the defendant Weingarten & Co. returned to the plaintiff a \$1000 deposit obtained from the plaintiff, less the aforementioned net loss of \$151.97, which deposit return was accepted by and was retained by the plaintiff.

(e) That the only involvement the Kellogg defendants had in the aforementioned purchase transaction which was never consummated, is that it is claimed that they sold 10 out of the 20 shares of Superior Oil Co. stock to the defendant Weingarten & Co. or to the defendant, Mabon Nugent & Co. at a price of \$1,140 per share.

(f) That said price of \$1,140 per share was not a manipulated price above the true market value of the shares.

(g) That since this action was commenced on December 28, 1968, more than five and one-half years ago, the plaintiff was totally unable to produce any proof whatsoever sufficient to warrant a trial, that the aforesaid price of \$1,140 per share was a manipulated price above the true market value of the shares.

(h) That in an identically entitled counterpart to this action commenced by the plaintiff in the Supreme Court, Kings County, that court entered an order of January 21, 1972 dismissing the action as to the Kellogg defendants upon the grounds of res adjudicata and collateral estoppel, which order was never reversed or otherwise modified in any way whatsoever.

Yours, etc.

Reavis & McGrath

By *Denis B. Sullivan*
DENIS B. SULLIVAN

Attorneys for the defendants
Spear Leeds & Kellogg, James Crane
Kellogg III, and Raymond E.
Grabowski
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 269-7600

TO:

Gainsburg, Gottlieb, Levitan & Cole
Attorneys for the Plaintiff
122 East 42nd Street
New York, N. Y. 10017

Satterlee, Warfield & Stephens
Attorneys for defendant, Vanden Broeck Lieber & Co.
277 Park Avenue
New York, N. Y. 10017

Hall, McNicoll, Marett & Hamilton
Attorneys for defendant, Thomson & McKinnon, Inc.
41 East 42nd Street
New York, N. Y. 10017

AFFIDAVIT IN OPPOSITION
BY PLAINTIFF-APPELLANT

-107-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ERNEST KLEIN,

Plaintiff,

-against-

68 Civ. 5148 M.I.G.

SPEAR LEEDS & KELLOGG, JAMES CRANE
KELLOGG, III, RAYMOND E. GRABOWSKI,
MABON NUGENT & CO., WEINGARTEN &
CO., HERMAN LASS, LEW SOHN, SIDNEY S.
BOBBE, VANDEN BROECK LIEBER & CO.,
THOMSON & MCKINNON, REYNOLDS & CO.,
and HERMAN FINS,

AFFIDAVIT IN
OPPOSITION

Defendants.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ERNEST KLEIN, being duly sworn, deposes and says:

1. He is the plaintiff in the above entitled action and submits this affidavit in opposition to the motion made by defendants SPEAR LEEDS & KELLOGG, JAMES CRANE KELLOGG, III and RAYMOND E. GRABOWSKI (hereinafter the "KELLOGG defendants") for

(a) Summary Judgment pursuant to Rule 56 of the F.R.C.P. dismissing the First Cause of Action as pleaded in the Amended Complaint and

(b) For an order pursuant to Rule 41 of the F.R.C.P. dismissing the Second Cause of Action pleaded in the Amended Complaint.

AS TO THE MOTION FOR SUMMARY JUDGMENT
IN REGARD TO THE FIRST CAUSE OF ACTION

2. As set forth in the Amended Complaint, a copy of

which is annexed hereto and made a part hereof as Exhibit 1, plaintiff, through WEINGARTEN & COMPANY, a brokerage firm, ordered the purchase of 20 shares of Superior Oil stock and 100 shares of Polaroid stock "at the market" on November 30, 1962. At that time plaintiff deposited \$1,000.00 with WEINGARTEN and agreed that the payment of the balance due for the purchase of these securities would be made against delivery of the stocks. On December 1, 1962 confirmation of purchase was received, acknowledging that 20 shares of Superior Oil was purchased at \$1,140.00 per share and 100 shares of Polaroid bought at \$129.00 per share. The total bill for these purchases was \$35,781.19, including commissions, leaving a balance due of \$34,781.19 to MABON NUGENT & COMPANY, a brokerage house who acted on behalf of WEINGARTEN in this transaction, which sum was to be paid upon delivery as aforesaid.

3. On December 5, 1962, plaintiff received a telegram from MABON threatening to liquidate the stocks purchased. Immediately upon receipt of this communication, deponent protested this untoward action of MABON, by telephone, and confirmed this protestation by telegram. On December 6, 1962, deponent personally advised MABON that arrangements had been made with O'DONNELL & CO., Inc., a financier, to pay the entire balance due against delivery of the stocks to O'Donnell. MABON, on December 8, 1962, notified plaintiff that they had liquidated the stock purchased although, concededly,

Mabon failed to deliver this stock which it had obligated itself to do.

5. As alleged in the Amended Complaint, and as will be shown, infra, when MABON purportedly sold this stock, neither it nor WEINGARTEN had possession or control of the stocks for delivery against payment as instructed by plaintiff and, further, the specialists in these respective stocks - and here we are concerned only with the KELLOGG defendants who act as specialists in the stock of Superior Oil - did not have the stock available for delivery against payment for the securities which they allegedly sold to MABON on November 30, 1962.

6. As the specialist on the New York Stock Exchange in Superior Oil stock, and, in that capacity as agents of the broker, the KELLOGG defendants were under a duty to maintain an orderly market in that stock and when the purchase order for the stock was presented, to acquire the shares ordered from those interested parties at the best possible price. It follows that such acquisition required the purchase of stock from a party or parties capable of delivering the stock on the settlement date.

7. Significantly, 10 shares of the 20 shares ordered came directly from KELLOGG's own supply. It should be noted that in this stock alone, 10 shares, because of the price of the security, were deemed a "round lot". As the Complaint alleges, the KELLOGG defendants conspired with

defendant VANDEN, BROECK, LIEBER & CO. (hereinafter "VANDEN") to sell to MABON the other 10 shares from its own account in two odd lots of five shares each. This so-called "bunching" of two odd lots is in violation of the rules and regulations of the Exchange and constitutes wrongful manipulation by the specialist in Superior Oil in acting as principals for their own account, making fictitious trades which could not be consummated on the settlement date and creating an artificial price of \$1,140.00 per share.

8. The \$1,140.00 per share price paid by plaintiff was the highest price of the day for the sale of Superior Oil. Annexed as Exhibit 2 is a copy of the Wall Street Journal, indicating that the high of the day in Superior stock was \$1,140.00 and the low, \$1,130.00, as alleged in the Complaint. It should be noted that at the time the purchase order was placed, the prevailing market price was \$1,130.00 per share and the quote which deponent received was \$1,125.00 bid, \$1,130.00 asked.

9. The Exchange Rules prohibit the specialist from buying for his own account at a given price while he holds an order to buy at a price from someone else, and the specialist must not buy stock at any price for his own account while holding an order to buy that stock "at the market". The same holds true with respect to the specialist selling for his own account while holding a sell order for someone else. He cannot compete

at the same price for this own account with orders he holds as a broker's broker. KELLOGG's actions here constitute a violation of the rules of the Exchange, which violation resulted in damage to plaintiff.

10. To further support plaintiff's claim of non-delivery, annexed hereto as Exhibit 3 is a summons and verified Complaint in a State Supreme Court action, entitled Klein v. Spear Leeds & Kellogg, et al. and as Exhibit 4, the verified Answer of defendant SIDNEY BOBBE in said action. Mr. BOBBE is an attorney who represented the MARON and WEINGARTEN defendants. Paragraph 5 of this Answer concedes that neither broker received delivery of the stock purchased from the respective specialists.

11. As a consequence of the above, the First Cause of Action clearly presents triable issues of fact:

(a) Was there fraud on the part of the KELLOGG defendants in the trade of Superior stock on November 30, 1962 wherein they promised, but failed, to deliver to the broker Superior stock from their own account?

(b) Did the KELLOGG defendants wrongfully conspire, to plaintiff's detriment, to make a non-bonified transaction by "bunching" odd lots of Superior Oil to make a round lot, which stock, again, was never delivered on the settlement date?

(c) Did the KELLOGG defendants manipulate the price of Superior Oil stock and violate the rules of the Exchange by selling the stock at the high price of the day from their

own account, i.e., was the stock sold at an artificially created price?

These issues can only be resolved upon the trial of the action.

12. Judge IRVING BEN COOPER, in a decision regarding this action, filed on July 29th, 1969, in referring to the First Cause of Action, has stated:

"Plaintiff, however, has also made out a claim under Section 10(b) of the Securities Exchange Act, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5⁴ See 3 Loss, Securities Regulation at 1781 and n.334 (2d ed. 1961). There being no applicable federal statute of limitations, we borrow the limitations applicable under the law of the forum state. See Saylor v. Lindsley, 65 Civ. 516 (S.D.N.Y. April 16, 1969). The applicable New York period of limitations is six years. Id.

4. Plaintiff may also have made out a claim under Section 17 (a) of the Securities Act of 1933, 15 U.S.C. §77g(a). Such a claim would be subject to the same state statute of limitations governing suits under Rule 10b-5. See Bromberg, Securities Law at 41, n.105 (1967); Deak v. Shannan, 227 F.Supp. 26 (S.D.N.Y. 1964). See also, Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 n.2 (2d Cir. 1951). "

13. Counsel for the KELLOGG defendants seeks summary judgment relying entirely upon the decision of District Judge MOTLEY dated August 22, 1972, a copy of which is annexed to the moving papers as Exhibit C. That opinion dealt wholly and solely with the motion made by brokers and the KELLOGG defendants took no part in that motion. Accordingly, Judge MOTLEY's findings must be deemed to be limited solely against brokers and that decision in no way can be construed to be in favor of the specialists against whom separate actions and violations are

pleaded.

14. This Court, at the outset, sought to distinguish the so-called "specialist claims" from those claims brought against brokers and against deponent's financier. In fact, deponent respectfully suggests that there is no reason why this action should not be consolidated for trial purposes with the so-called "specialist" actions as more particularly set forth in the first pretrial order of this Court in the case of Klein v. Kenney, et al, 68 Civ. 4970 and amendment thereto.

15. Deponent further suggests that despite the multitude of misstatements contained in Mr. SULLIVAN's affidavit in support of the motion, the sole basis upon which he seeks summary relief is the MOTLEY decision, and under these circumstances, and based upon the facts set forth herein, deponent respectfully prays that summary judgment be denied.

AS TO THE MOTION IN REGARD TO
THE SECOND CAUSE OF ACTION

16. Defendant contends that dismissal pursuant to Rule 41, F.R.C.P. is warranted because (a) the activities complained of are the subject of a later action brought by plaintiff in this Court (Klein v. Bache & Co., et al, 71 Civ. 20) and (b) that plaintiff has "apparently abandoned the second cause of action in favor of that later action" Both contentions are erroneous and the relief sought is wholly unwarranted.

17. The pattern practiced by the KELLOGG defendants follows a continuous thread throughout all proceedings instituted against them by deponent; to wit, creating a sale (or purchase, as the particular case may be) at a fictitious price before executing upon plaintiff's stop-loss orders so as to create an appearance of a sale at or below the stop-loss order, thereby fraudulently acquiring (or selling) plaintiff's Superior Oil stock for themselves at prices either higher or lower than the then prevailing market price.

18. The BACHE & CO. action (71 Civ. 20) does involve the same basic facts as does this action and was instituted, as Mr. SULLIVAN knows, because in the deposition which I took of defendant THOMSON & McKINNON, a broker, its representative testified that transactions here in suit were not sold and executed through it but rather through BACHE & CO., another broker, which firm had placed the stop-loss orders on plaintiff's 50 shares of Superior Oil stock. It was only after this information was disclosed that I instituted the BACHE & CO. action (see paragraphs 25-56 of Exhibit F, submitted in support of the Motion).

19. The instant action and the BACHE action were commenced by deponent pro se, and no prior attempt has been made to consolidate these actions. As my counsel had advised me, this Court, in Klein v. Kenney, et al. (68 Civ. 4970), has determined that all of plaintiff's actions against the

specialists set forth what has been alleged as a common plan or scheme to manipulate the price of stock and, accordingly, it saw fit after several pretrial conferences, to separate the so-called "specialist cases" from the other actions. The First Pretrial Order in Klein v. Kenney (68 Civ. 4970) provides:

"The action against defendants Spear, Leeds & Kellogg, James Crane Kellogg III and Raymond E. Grabowski is severed from this trial, and the severed action shall be joined for trial with the consolidated actions, supra."

20. The trial of the "specialist cases" was to follow the trial of the remaining causes of action in Klein v. Kenney, which action was pending before this Court but has since been assigned to Judge Connor. That action has been settled in part as against all remaining defendants except JAMES D. O'DONNELL & CO., JAMES D. O'DONNELL and RUEBEN ROSE. Trial has not yet been had because the principal defendant, JAMES D. O'DONNELL has undergone open heart surgery and is physically unable to appear on trial.

21. Plaintiff does not intend to conduct any further pretrial proceedings in the so-called five "consolidated" actions nor in this action and the BACHE action involving the KELLOGG defendants; and, as stated, the proof in this action, as well as in the BACHE action, follow the same line. Certainly, the KELLOGG defendants cannot claim that they have been prejudiced by any delay, and deponent respectfully requests that this Court enter an Order directing that this action and the BACHE action, at least insofar as they pertain to the specialists, be consolidated with the five other already consolidated specialist

cases for trial.

22. Under these circumstances, deponent contends the interests of justice would best be served by consolidating the specialist cases as requested, since one complete and finite disposition could be made of all of plaintiff's claims involving specialists. No action has been abandoned by deponent either by inadvertence or design, and deponent has not proceeded to perfect the appeal in the companion action in the State court, since a determination as to the role played by the specialists in my transactions determined in this Court may serve to render such actions moot.

23. Deponent respectfully urges that the motion to strike the Second Cause of Action set forth in the Amended Complaint be denied, and requests that this action and the BACHE action, supra, be consolidated, insofar as the claims against the specialists are concerned, with the five already consolidated actions for trial.

ERNEST KLEIN

Sworn to before me
this 7th day of June, 1974.

EXHIBIT 1

AMENDED COMPLAINT

The Amended Complaint herein is printed on pages 12-34
in the Appendix To Plaintiff-Appellant's Brief.

EXHIBIT 2

New York Stock Exchange Association										NYSE									
Listed Companies										Listed Companies									
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40
41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60
61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80
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541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560
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901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920
921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940
941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960
961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980
981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000

SUMMONS

C 199—Summons without Notice, Supreme Court. 4-G1
Personal or Substituted Service.

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80 EXCHANGE PLACE AT BROADWAY, NEW YORK

Supreme Court of the State of New York

County of Kings

ERNEST KLEIN,

Plaintiff

SPEAR, LEADS & KELLOGG, ^{against} JAMES CRANE KELLOGG III,
RAYMOND E. GRABOWSKI, VANDEN, BROECK, LIEBER &
CO., WEINGARTEN & CO., HERMAN LASS, LEW SONN,
MABON, NUGENT & CO., SIDNEY S. BOBBE, THOMSON &
McKINNON, REYNOLDS & CO., and HERMAN FINS,

Defendant S.

Index No.

Plaintiff designates
Kings

County as the place of trial

The basis of the venue is

Plaintiff resides in Kings
County

Summons

Plaintiff resides at
5517 15th Avenue
Brooklyn, N.Y.

County of Kings

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, November 27, 1968.

ERNEST KLEIN

~~XXXXXX~~ Plaintiff Pro Se

Office and Post Office Address

5517 15th Avenue
Brooklyn, N.Y. 11219
UL.1-5390

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

{
{ SAME TITLE }
{

VERIFIED
COMPLAINT

Plaintiff pro se, complaining of the defendants, is informed and believes, and thus alleges on information and belief:

1. Upon information and belief, defendant SPEAR, LEEDS & KELLOGG (hereinafter called "SPEAR"), at all times relevant hereto, was a partnership engaged in business as brokers and dealers in securities, with its principal office at 111 Broadway, in the County and State of New York.

2. Upon information and belief, defendant "SPEAR," at all times relevant hereto, was a member of the New York Stock Exchange, and of the National Association of Securities Dealers, Inc.

3. Upon information and belief, defendant JAMES CRANE KELLOGG III (hereinafter called "MR. KELLOGG"), at all times relevant hereto was a member of the New York Stock Exchange, and was a partner of defendant "SPEAR," and was one of the specialists handling the stock of Superior Oil of California (hereinafter called "SUPERIOR"), on the New York Stock Exchange.

4. Upon information and belief, defendant RAYMOND E. GRABOWSKI (hereinafter called "GRABOWSKI"), at all times relevant hereto was a partner and a member of the defendant "SPEAR," and one of the specialists handling the stock of "SUPERIOR" on the New York Stock Exchange.

5. Upon information and belief, at all times relevant hereto, the defendant, "SPEAR," was the "specialist" on the New York Stock Exchange in the stock of "SUPERIOR."

6. Upon information and belief, defendant, MABON, NUGENT & CO. (hereinafter called "NUGENT"), at all times relevant hereto, was a partnership, engaged in business as brokers and dealers in securities, and was a member of the New York Stock Exchange, and of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York.

7. Upon information and belief, MABON & CO. (hereinafter called "MABON"), at all times relevant hereto was a partnership engaged in business as brokers and dealers in securities and was a member of the New York Stock Exchange and of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York, and is the predecessor of defendant "NUGENT."

8. Upon information and belief, defendant VANDEN, BROECK, LIEBER & CO. (hereinafter called "VANDEN"), at all times relevant hereto, was a partnership engaged in business as brokers and dealers in securities and was a member of the New York Stock Exchange and of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York.

9. Upon information and belief, defendant WEINGARTEN & CO. (hereinafter called "WEINGARTEN"), at all times relevant hereto, was a partnership engaged in business as brokers and dealers in securities and was a member of the New York Stock Exchange, and was a member of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York.

10. Upon information and belief, defendant HERMAN LASS (hereinafter called "LASS"), at all times relevant hereto, was a partner, associate or employee of defendant "WEINGARTEN."

11. Upon information and belief, defendant LEW SONN (hereinafter called "SONN"), is and at all times relevant hereto, was a partner, associate or employee of defendant "WEINGARTEN."

12. Upon information and belief, defendant SIDNEY S. BOBBE (hereinafter called "BOBBE"), at all times relevant hereto, was an attorney at law, with his office located in the County and State of New York.

13. Defendant "BOBBE" was the attorney for "WEINGARTEN" and "NUGENT" in an action, brought by plaintiff in 1966, in Supreme Court, Kings County, entitled Ernest Klein, plaintiff, vs. Weingarten & Co., and Mabon, Nugent & Co., defendants.

14. Upon information and belief, defendant THOMSON & McKINNON (hereinafter called "THOMSON"), at all times relevant hereto, was a partnership engaged in business as brokers and dealers in securities, and was a member of the New York Stock Exchange and of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York.

15. Upon information and belief, defendant REYNOLDS & CO. (hereinafter called "REYNOLDS"), at all times relevant hereto, was a limited partnership engaged in business as brokers and dealers in securities and was a member of the New York Stock Exchange and of the National Association of Securities Dealers, Inc., and maintained its principal office in the County and State of New York, and a branch office in Ridgewood, New Jersey.

16. Upon information and belief at all times relevant hereto, the defendant HERMAN FINS (hereinafter called "FINS"), was a registered representative (customer's man) of defendant "REYNOLDS."

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS
"SPEAR," "KELLOGG," "CHADORSKI," "VANDER," "EUGENT,"
"WEINGARTEN," "LASS," "SOBEL," and "BOBBE"

17. Plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" through "16" as if fully set forth at length herein.

18. On the 30th day of November, 1962, plaintiff entered into an agreement with defendant "WEINGARTEN" whereby "WEINGARTEN" agreed to act as plaintiff's stockbroker, agent and fiduciary and to open two (2) accounts for plaintiff, in plaintiff's name, namely, a cash account for the purchase of securities on the said day, November 30, 1962 in such cash account, and a margin account for the eventual future purchases of securities in such margin account.

19. It was further agreed between plaintiff and "WEINGARTEN" that plaintiff would deposit \$1,000. in said cash account and would pay the full balance due on securities purchased in such cash account against delivery of such securities to plaintiff or his designee.

20. Pursuant to the agreement as aforesaid, plaintiff deposited \$1,000.00 with "WEINGARTEN" and ordered "WEINGARTEN" to purchase 20 shares of "SUPERIOR" and 100 shares of "POLAROID" for said account on November 30, 1962.

21. Thereafter, on said day of November 30, 1962 "WEINGARTEN" informed plaintiff that it had in fact executed the aforesaid purchase orders, and had bought for plaintiff twenty (20) shares of "SUPERIOR" at \$1,140.00 per share and one hundred (100) shares of "POLAROID" at \$129.00 per share.

22. Thereafter, on or about December 3, 1962, plaintiff received confirmation from "MABON" that it had bought on behalf of "WEINGARTEN" the aforementioned securities for plaintiff.

23. On December 6 1962, plaintiff instructed "MABON" to deliver the stock certificates of the aforesaid securities to plaintiff's designee, against payment of \$34,781.19, the full amount claimed to be due thereon.

24. "MABON" failed and refused to comply with plaintiff's instructions and did not deliver said securities.

25. Upon information and belief, neither "MABON" nor "WEINGARTEN" had in their possession or control the aforesaid stock certificates physically ready and available for delivery, on said date of December 6, 1962.

26. Upon information and belief, "MABON" and "WEINGARTEN" wrongfully treated the aforesaid purchase transactions as if they were purchased in a margin account, whereas, on the contrary, they were ordered, by plaintiff, to be bought in the cash account, and were bought in a cash account.

27. Upon information and belief, "NUGENT," "WEINGARTEN," "LASS," "SONN," AND "BOBBE," fraudulently represented and stated that the aforesaid purchases were made in a "General Account."

28. Upon information and belief, on November 30, 1962, at the time when plaintiff's order for the purchase of the 20 shares of "SUPERIOR" was transmitted to the New York Stock Exchange, the then prevailing price for "SUPERIOR" was below \$1,140.00 per share.

29. Upon information and belief, ten (10) shares of the aforesaid twenty (20) shares of "SUPERIOR" were sold by the defendant "SPEAR," as principal, for its own account.

30. Upon information and belief, ten (10) shares of the aforesaid twenty (20) shares of "SUPERIOR" were sold by the defendant "VANDEN" as principal, for its own account.

31. Upon information and belief, "MABON" and/or "WEINGARTEN," manipulated the execution transaction of the order and the price of said 20 shares of "SUPERIOR" by obtaining them from "SPEAR," or "KELLOGG," or "GRABOWSKI," or from "VANDEN," the specialists in "SUPERIOR," and at higher prices than the prevailing market price was at that time for "SUPERIOR" stock, instead of obtaining them on the

VERIFIED COMPLAINT

open market of the New York Stock Exchange, without notification to plaintiff of such fact.

32. Upon information and belief, "SPEAR," and "VANDEN" did not deliver to the "MABON" on December 7, 1962, the aforesaid 20 shares of "SUPERIOR."

33. Upon information and belief the execution of the order by "MABON" through "SPEAR" and "VANDEN," and the purchase price of the 20 shares of "SUPERIOR" at \$1,140.00 per share. constituted a manipulative and deceptive device, scheme or plan to defraud plaintiff, and constituted a violation of the Rules of Fair Practice of the National Association of Securities Dealers, Inc., and of the rules and regulations of the New York Stock Exchange, and constituted a violation of the present New York General Business Law, Sections 351, 351a, 351b, 351d, formerly known as the New York Penal Law.

34. Upon information and belief, "BOBBE," "LASS," "SONN," "KELLOGG," "GRABOWSKI," "NUGENT," "WEINGARTEN," "SPEAR," "VANDEN," and "MABON" severally, and each of them, conspired with each other in concealing and circumventing the discovery of the aforementioned violations and fraudulent acts, and to abuse process for the purpose of obstructing justice.

35. Upon information and belief, "NUGENT," and "MABON" fraudulently and wrongfully treated and designated plaintiff's purchases of said securities as if they were bought in a "margin account," when they were bought in a cash account, and such fact was known to "NUGENT" and to "MABON."

36. Upon information and belief, "WEINGARTEN," "LASS," "SONN," and "BOBBE," fraudulently and wrongfully treated and designated plaintiff's purchase of said securities, as if they were bought in a "margin account" when they were bought in a cash account, and such fact was known to said defendants.

37. Upon information and belief, "NUGENT," "MABON," "WEINGARTEN," "LASS," "SONN," and "BOBBE" fraudulently and wrongfully treated plaintiff's purchase of said securities as if they were bought in a "general account,"

VERIFIED COMPLAINT

when they were bought in a cash account, and such fact was known to said defendants.

38. Upon information and belief, on the 6th day of December, 1962, "MABON" had not received from the selling broker of the "POLAROID" stock the 100 shares of "POLAROID," and did not possess certificates of 100 shares of "POLAROID" stock for delivery to plaintiff or to his designee on said date.

39. Upon information and belief on the 7th day of December 1962 "MABON" had not received from the selling broker of the "POLAROID" stock the 100 shares of "POLAROID," and did not possess certificates of 100 shares of "POLAROID" stock for delivery to plaintiff or to his designee on said date.

40. Upon information and belief, on the 6th day of December 1962, "MABON" had not received from the aforementioned purported sellers, "SPEAR" and "VANDEN," the 20 shares of "SUPERIOR;" and "MABON," did not possess on said date, certificates of 20 shares of "SUPERIOR," for delivery to plaintiff or to his designee.

41. Upon information and belief, on the 7th day of December 1962, "MABON," had not received from the aforementioned purported sellers, "SPEAR" and "VANDEN," the 20 shares of "SUPERIOR"; and "MABON," did not possess certificates of 20 shares of "SUPERIOR" for delivery to plaintiff or to his designee, on said date.

42. Upon information and belief on the 6th day of December 1962, "WEINGARTEN" had not received from the aforementioned purported sellers, "SPEAR" and "VANDEN," the 20 shares of "SUPERIOR"; and "WEINGARTEN" did not possess on said date certificates of 20 shares of "SUPERIOR" for delivery to plaintiff or to his designee.

43. Upon information and belief, on the 7th day of December 1962

"WEINGARTEN" had not received from the aforementioned purported sellers "SPEAR" and "VANDEN" the 20 shares of "SUPERIOR"; and "WEINGARTEN" did not possess on said date, certificates of 20 shares of "SUPERIOR" for delivery to plaintiff or to his designee.

44. Upon information and belief, "MABON" and/or "WEINGARTEN" failed and refused to deliver to plaintiff or his designee the above named securities ordered by plaintiff, and wrongfully and fraudulently sold same, before paying for the same the amounts due to the sellers, and before receiving possession of the certificates of the said securities.

45. By reason of the foregoing wrongful and fraudulent acts of "MABON," "NUGENT," "WEINGARTEN," "BOBBE," "SPEAR," "KELLOGG," "GRABOWSKI," and "VANDEN," and as a result thereof as aforesaid, the plaintiff never received said 20 shares of "SUPERIOR" and 100 shares of "POLAROID," stock, and plaintiff sustained damages in the sum of \$112,318.81.

46. As a result of the fraudulent and wrongful representations, manipulations and violations, as aforesaid, plaintiff requests punitive damages in the sum of \$336,956.43.

WHEREFORE, plaintiff demands judgment:

(a) against defendants "SPEAR," "KELLOGG," "GRABOWSKI," "VANDEN," "NUGENT," "WEINGARTEN," "LASS," "SONN," and "BOBBE," in the sum of ONE HUNDRED TWELVE THOUSAND THREE HUNDRED EIGHTEEN and 81/100 (\$112,318.81) DOLLARS, and for punitive damages in a sum of THREE HUNDRED THIRTY SIX THOUSAND NINE HUNDRED FIFTY SIX and 43/100 (\$336,956.43) DOLLARS on the First Cause of Action.

Verified, February 25, 1969.

ERNEST KLEIN
Plaintiff, Pro Se
5517 - 15th Avenue
Brooklyn N. Y. 11219
Telephone: Ulster 1-5390

EXHIBIT 4

DEFENDANT BOBBE'S VERIFIED ANSWER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

.....
ERNEST KLEIN,

Plaintiff,

- against -

2481 - 1969

SPEAR, LEEDS & KELLOGG et al,

Defendants.
.....

The defendant SIDNEY S. BOBBE, appearing pro se, for his answer to the first cause of action contained in the complaint herein, alleges as follows:-

1. Denies knowledge or information sufficient to form a belief as to the paragraphs of the complaint numbered 1 to 4 inclusive; 8; 14; 15; 16; 29 and 30.
2. On information and belief, denies the allegations of the complaint numbered 18, 19, 23, 26, 27, 28, 31, 33, 34, 35, 36, 37, 44 and 46.
3. On information and belief, denies the allegations contained in paragraph 20 of the complaint insofar as it refers to a deposit being made pursuant to the alleged agreement.
4. On information and belief, admits that "MABON" did not deliver said securities, but denies the other allegations contained in the paragraph of the complaint numbered 24.
5. On information and belief, denies the allegations contained in the paragraphs of the complaint numbered 25; and 38 to 43 inclusive, except that this defendant admits that neither Mabon & Co. nor Weingarten & Co. received the certificates of stock from either "SPEAR" or "VANDEN".
6. On information and belief, denies the allegations of the complaint contained in paragraph numbered 45, except that this defendant admits that the

DEFENDANT BOBBE'S VERIFIED ANSWER

plaintiff never received the shares of stock from Mabon, Nugent or from Weingarten.

FOR A FIRST SEPARATE AND COMPLETE
DEFENSE TO THE FIRST CAUSE OF ACTION:

7. This defendant alleges that the plaintiff is estopped from bringing this action against this defendant by reason of the fact that all the essential claims of the plaintiff herein have been adjudicated, adversely to the plaintiff, in an action brought by him in the Supreme Court, Kings County, entitled "Ernest Klein, Plaintiff, vs. Weingarten & Co. and Mabon, Nugent & Co., Defendants," having index number 6563-1967, in which action this Court granted summary judgment to the defendants therein named, dismissing the complaint, by order entered in the office of the Clerk of this Court on the 17th day of July, 1967, pursuant to which a judgment was duly entered in favor of the defendants therein and against the plaintiff, on the 27th day of July, 1967,

8. That the complaint in said action alleged, as does the present complaint, that on the 30th day of November, 1962, the plaintiff entered into an agreement with the defendant Weingarten to purchase twenty shares of the common stock of Superior Oil of California and one hundred shares of the common stock of Polaroid Corporation, at the then market price of each on the New York Stock Exchange, in a cash account, and that pursuant to said agreement the plaintiff deposited \$1,000.00 with the defendant Weingarten, who, it was alleged, agreed to advance the full amount of monies on account of each such purchase, and to have the physical certificates of said securities ready and available for delivery to the plaintiff or his designee against the payments due thereon; and it was further alleged that the plaintiff and the defendant Weingarten agreed that the plaintiff would have at least seven business days after the purchase date of said securities to pay for them, against their delivery to plaintiff or his designee.

DEFENDANT BOBBE'S VERIFIED ANSWER

9. That said complaint further alleged that the plaintiff was notified of the purchase of said shares of stock of Superior Oil of California at \$1,140. per shares, and of the purchase of one hundred shares of the common stock of Polaroid Corporation at \$129.00 per share, and that the defendants, in breach of their agreement with the plaintiff, failed to comply with plaintiff's request to advise him where the stock certificates would be available for delivery against payment, and did not deliver said securities to plaintiff or his designee; and further, that the defendants therein did not have in their possession the afore-said stock certificates physically ready and available for delivery against payment by plaintiff or his designee.

10. That all of those allegations of the complaint in said prior action were decided adversely to the plaintiff, and have thus been duly adjudicated against him, and he is estopped from re-asserting the identical claims, which he does attempt to re-assert in the instant complaint, not only against the defendants in said prior action, but also against their employe Herman Lass, their partner Lew Sonn, and this answering defendant Bobbe, the last-named because of his participation in the prior action as attorney for the defendants therein, and on the basis of representations made by him to the Court as such attorney in said prior action.

11. That subsequent to the granting of said motion for summary judgment dismissing the complaint, the plaintiff, in said prior action, made a motion for reargument of that motion. His motion was denied.

12. That thereafter he served a notice of appeal from the order granting summary judgment, to the Appellate Division of the Supreme Court, Second Department; which appeal was dismissed for neglect to prosecute.

13. That, next, the plaintiff made application to the Court which had

DEFENDANT BOBBE'S VERIFIED ANSWER

granted the motion for summary judgment, for a reconsideration and reargument, which application was denied; the Justice rendering said decision, Mr. Justice Feiden, writing a memorandum which ^{he} designated as not to be published, but to which reference is hereby made by this defendant in order to show that the subject matter of the instant suit has been fully adjudicated, and that the instant action is brought maliciously and for the sole purpose of harassment and intimidation.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

14. That subsequent to the denial of that second motion for reargument, the plaintiff brought another action, in the Supreme Court, New York County, in or about the month of May, 1968, entitled "Ernest Klein, Plaintiff vs. Mabon, Nugent & Co., Weingarten & Co., Herman Lass, Lew Sonn, Spear, Leeds & Kellogg, Vanden, Broeck, Lieber & Co. and Sidney S. Bobbe."

15. That when the plaintiff failed to serve a complaint therein within twenty days after service of a notice of appearance by all the defendants, a motion was made to dismiss the action, which motion was granted unless the complaint was served within twenty days after service of a copy of the order. The plaintiff thereupon cross-moved for the right to conduct examinations before trial in order to frame a complaint, which application was denied; and when he still failed to serve a complaint within the time fixed by the order, another motion was made to dismiss the action, whereupon the plaintiff asked for an extension of time to serve a complaint; but on September 20, 1968, an order was entered denying his motion and granting the cross-motion of the defendants to dismiss the action. No further steps were taken by the plaintiff in that action.

FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

16. That prior to the service of the summons and complaint in this action

DEFENDANT BOBBE'S VERIFIED ANSWER

on this defendant, the plaintiff instituted an action in the United States District Court for the Southern District of New York, against the same defendants as those named in this complaint, and making the identical allegations as those contained in the present complaint, except for a reference to Federal Statutes, which are omitted from the present complaint. That action in the U. S. District Court is still pending undetermined.

17. That since there is another action pending for the same relief, the instant case is not maintainable.

WHEREFORE, the defendant Sidney S. Bobbe, demands judgment dismissing the complaint as against him, together with the costs and disbursements of this action.

SIDNEY S. BOBBE,
Defendant Pro Se,
36 West 44th Street
New York 10036, N. Y.

COUNTY AND STATE OF NEW YORK:

SIDNEY S. BOBBE hereby affirms to the Court, under the penalties of perjury;

That I am an attorney at law, duly licensed to practice law in the State of New York.

That I am one of the defendants above-named appearing pro se.

That I have read the foregoing answer, and know the contents thereof, and that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to those I believe it to be true.

Dated New York, March 27, 1969.

SIDNEY S. BOBBE

RULE 9 (g) STATEMENT ON BEHALF
OF PLAINTIFF-APPELLANT

-133-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

ERNEST KLEIN,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	68 Civ. 5148 M.I.G.
SPEAR LEEDS & KELLOGG, JAMES CRANE	:	
KELLOGG, III, RAYMOND E. GRABOWSKI,	:	RULE 9 (g) STATEMENT
MABON NUGENT & CO., WEINGARTEN &	:	ON BEHALF OF PLAINTIFF
CO., HERMAN LASS, LEW SONN, SIDNEY	:	
S. BOBBE, VANDEN BROECK LIEBER &	:	
CO., THOMSON & MCKINNON, REYNOLDS &	:	
CO., and HERMAN FINS,	:	
	:	
Defendants.	:	

-----X

Defendants Spear Leeds & Kellogg, James Crane Kellogg, III and Raymond E. Grabowski (the Kellogg defendants) seek summary judgment pursuant to Rule 56 F.R.C.P. dismissing as to them the claims asserted in the First Cause of Action of the amended complaint.

The motion is predicated wholly and solely upon the decision of Judge Motley dated August 24, 1972 (annexed as Exhibit C to the moving papers) and the affirmance of that opinion by the Court of Appeals (annexed as Exhibit E to the moving papers). Concededly, the Kellogg defendants took no part in that motion, which was brought by defendants Mabon Nugent & Co. and Weingarten & Co., both firms acting as brokers for plaintiff. The Kellogg defendants were specialists for the transactions here involved, whose role and function materially differ from that of a broker.

Judge Motley's decision, wherein Mabon Nugent & Co. and Weingarten & Co. are described as "broker-defendants" (p.2) reflects only that plaintiff was unable to establish that the

brokers with whom he dealt were in no way involved in the conspiracy to manipulate the price of Superior Oil stock purchased by plaintiff. It does not, either expressly or by implication, state that there was no manipulation of the Superior Oil stock by the specialist.

The specialist is required to maintain an orderly market, and when given an order from a broker to buy or sell the particular security in which it specializes, it must do so from disinterested parties at the best possible price.

Plaintiff's affidavit in opposition to the instant motion cogently sets forth and documents those material facts giving rise to genuine issues which can only be resolved upon trial and which were not a part of the proceedings before Judge Motley (see plaintiff's affidavit in opposition, para. 11).

As stated, since the sole basis for the Kellogg defendants' motion for summary judgment is Judge Motley's decision, their motion must be denied as matter of law.

Yours, etc.

GAINSBURG, GOTTLIB, LEVITAN & COLE

By

Richard J. Rubin
Attorneys for Plaintiff
122 East 42nd Street
New York, New York 10017
(212) 697-3440

TO:

Reavis & McGrath
Attorneys for defendants
Spear Leeds & Kellogg, James
Crane Kellogg, III and
Raymond E. Grabowski
1 Chase Manhattan Plaza
New York, N.Y. 10005

Sattler, Warfield & Stephens
Attorneys for Defendant Vanden Broeck, Lieber & Co.
277 Park Avenue
New York, New York 10017

Hall, McNicoll, Marrett & Hamilton
Attorneys for Defendant Thomson & McKinnon, Inc.
330 Madison Avenue
New York, New York 10017

STATE OF NEW YORK, COUNTY OF KINGS

ss.:

Carolee Russo, being duly sworn, deposes and says: deponent is not a party to the action.
is over 18 years of age and resides at 2951 Ocean Avenue, Brooklyn, N. Y.

☒ Affidavit of Service By Mail On March 24, 1975 deponent served the within Appendix to Plaintiff-Appellant's Brief upon Reavis & McGrath, Esqs. attorney(s) for ~~Moving~~ ^{APPELLEE} Defts. in this action, at 1 Chase Manhattan Plaza, N.Y.C., the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~a post-office~~ an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at upon deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on March 21, 1975

Mary L. Klein

MARY L. KLEIN
NOTARY PUBLIC, State of New York
No. 24 2145425
Qualified in Kings County
Commission Expires March 30, 1977

Carolee Russo
The name signed must be printed beneath
Carolee Russo